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NOTES.

THE sudden and lamented death of Mr. W. E. Hall has diminished the small number of English lawyers who have been qualified to discuss international matters with their Continental colleagues on equal terms of training and information as well as ability. Mr. Hall's book on International Law took its place at once as the best text-book of the subject yet produced in this country, and his recent work on Foreign Jurisdiction broke new ground in a region where skilled exploration was much wanted. His method was exact without pedantry and English without insularity. Not the least praise of his writings is that they are wholly free from the patriotic bias which too often disfigures the reasoning and the conclusions of publicists. Neither partisanship for his own country nor the fear of being thought a partisan ever prevented Mr. Hall from doing his best to form an impartial judgment on accurately ascertained facts. A fuller notice of his work will appear in the next number. F. P.

In the article on 'Some Points of Difference between English and Scottish Law,' which appeared in the REVIEW for October, there was an inaccuracy which it may be well to correct. It was stated that in Scotland, in the case of a person who could not write, a deed had to be executed by two notaries before four witnesses. This was the old law. An alteration was made by the Conveyancing (Scotland) Act of 1874. Section 41 of this statute enacted that execution by a single notary or Justice of the Peace before two witnesses should be sufficient. J. A. LOVAT-FRASER.

Next month the Editor of this REVIEW will enter upon the office of Editor of the Law Reports. He cannot be expected to criticize in public the work for which he is himself answerable to the profession. But any criticism or suggestion which our learned readers may think proper to send to him will be considered, and he will be

glad to publish or notice in this REVIEW (of course as coming from correspondents) those which appear of sufficient importance.

In our last number we accidentally omitted to mention the name of Mr. Charles Elton, Q.C. among the contributors to whom we have been indebted, and we now request our readers to consider his name inserted among the 'representatives of special branches of learning and applied legal science' to whom we expressed our thanks (vol. x. p. 289). Another apology is due from the Editor to Mr. Justice Holmes. The phrase 'the Common Law abhors a vacuum of property' (vol. x. p. 320) is almost identical with the language of Holmes on the Common Law, at p. 237. The reminiscence was quite unconscious at the time. A more specific authority than either Mr. Justice Holmes or the Editor adduced may be found in Doctor and Student, Dial. ii. c. 51: 'The law must needs reduce the properties of all goods to some man.' Note, reader, that the case of *Arrow Shipping Co.* v. *Tyne Commissioners*, in which this question is touched upon, as we mentioned in vol. x. p. 293, is now reported in the Law Reports, '94, A. C. 508. In this case the ship had been abandoned to underwriters.

Why are we receiving no more Year Books from Mr. Pike? The Introduction to his last volume was dated in August, 1891, and his previous exploits had led us to hope that we were to have at least one volume a year. We must ask him to remember that he is uniquely competent to carry on the work that he has admirably begun. He must forgive us if we say that even his interesting book on the House of Lords will not excuse him in the eyes of posterity if he abandons the important task on which he entered. The series in which his volumes have appeared is published 'under the direction of the Master of the Rolls.' We hope that the Master of the Rolls will forthwith direct that the publication of the Year Books shall go forward with all convenient speed, and shall not be suspended, at all events so long as there are any reports of the fourteenth century that have never been printed.

The decision of the Court of Appeal in the *Maxim Nordenfelt Company's* case is affirmed by the House of Lords, '94, A. C. 535, and in such a way as to broaden and simplify the principles of the law. Lord Herschell and Lord Macnaghten agree in justifying, substantially if not verbally, the revolt of Sir Edward Fry, now fourteen years ago, against the supposed rule that an agreement in restraint of trade could be valid only if expressly limited in space. The rule, while it existed, was not a substantive rule of law, but only a primary test—for the most part a sufficient one before the

modern improvement of communications—whether the restriction exceeded what could be reasonably required for the covenantee's protection. Lord Macnaghten's masterly opinion is especially deserving of most careful study. It is good to see that the Common Law is still capable of development even on familiar ground.

Sirdar Gurdyal Singh v. *Rajah of Faridkote*, '94, A. C. 670, is a curious and interesting case as showing to what extent even the minor Native States of India retain their individuality in matters of internal justice and jurisdiction. Probably ninety-nine readers of the Law Reports out of a hundred have never heard of either Faridkote or Jhind. But the jurisdictions of these two States are as distinct as those of New York and California, and a Faridkote judgment is a foreign judgment in Jhind and every other part of India outside Faridkote, whether British or native territory. The principle enforced in the case is a fundamental one, namely, that all jurisdiction is properly territorial, and claims of a local court to extra-territorial jurisdiction which are not established by treaty, voluntary submission, or other good special cause, will not be regarded by any foreign court. The fact of the cause of action having arisen within the jurisdiction and at a time when the defendant was subject to it is not of itself sufficient cause for this purpose.

The important copyright cases of *Hanfstaengl* v. *Empire Palace*, *Hanfstaengl* v. *Newnes*, of which the first was noted in our October number (p. 295) from 'The Reports,' are now reported in the Law Reports, '94, 3 Ch. 109. The decision of the C. A. was affirmed in H. L. Dec. 17, 1894. In another branch of that subject, sect. 18 of the Copyright Act of 1842—the worst drawn section of a singularly ill-drawn Act—has been a little more cleared up: *Johnson* v. *Newnes*, '94, 3 Ch. 663. Romer J. decided, in substance, that separate and distinct works do not lose their individuality or their claim to separate protection by being published in the same volume or number, or under one more general title.

'In the absence of authority, my Lord,' said an eminent Q.C. the other day, 'we are reduced to look at the case on the low ground of principle.' The irony was not so great after all. An English lawyer feels helpless without a case, and as a consequence we are case-ridden. Take that small corner of the law field—directors' qualification—it is become a perfect quagmire, and fresh cases serve only to make it worse. Said Vaughan Williams J. in a recent case (*In re The Issue Co.*, not yet reported), in which he was being plied by counsel on both sides with qualification cases, 'Mr. X., cannot we put the cases aside for a moment, and argue this

case on principle?' And lo! light out of darkness. The fallacy which has perplexed this matter so much is that of confusing an agreement to qualify with an agreement to become a member of the company within section 23 of the Companies Act, 1862—two different things. *In re Bolton & Co., Salisbury-Jones and Dale's case*, '94, 3 Ch. 356, 7 R. Nov. 171, C. A.—another qualification case—was a very pretty puzzle, as we may guess when Lindley L.J. dissents from the Lord Chancellor and Lord Davey on a point of company law. Let us hope the new company law reform Commission will put this qualification question on a rational and permanent basis.

The decision of the Court of Appeal in *Warren* v. *Murray*, '94, 2 Q. B. 648, 9 R. Dec. 318, settles that the proviso to section 7 of the Real Property Limitation Act is not confined to express trusts. This follows and approves *Drummond* v. *Saut*, L. R. 6 Q. B. 763, a case doubted by some real property lawyers (see Lightwood on Possession of Land, 220, 221), although it was decided by a strong and unanimous Court (Blackburn, Lush, and Hannen JJ.). The point of substance is that possession rightfully entered upon, and continuously justifiable under an equitable title, must now be referred by every branch of the Court to that title, and not treated as a possession adverse to the legal estate. An occupier under an agreement which entitles him to a lease at a peppercorn rent is a tenant at will so far as regards his interest at common law, but in equity he is a virtual leaseholder entitled at any moment to specific performance of the agreement, and there is no question of the Statute of Limitations running against the freeholder before the expiration of the term contracted for.

Re Harding, '94, Ch. 315, 7 R. Oct. 64, C. A., is a case of some importance to conveyancers. It exhibits the defeat of an ingenious and persistent attempt to narrow the construction of a power in a marriage settlement, in fact to persuade the Court to reverse the ordinary principle *ut res magis valeat quam pereat*. Observe that the law stands blameless for this kind of litigation. Four judges, three of them equity lawyers of special eminence, held that there was no real doubt. Neither Parliament nor the judges could, without danger of real oppression, deprive obstinate parties of the right to argue out untenable points. The full reporting of such a case is perhaps useful as a warning against such adventures rather than for any real addition it can make to legal knowledge.

The Court of Appeal has made it clear, by the judgments of both its divisions (*Hood Barrs* v. *Cathcart*, '94, 2 Q. B. 559, 9 R. Sept. 199, 9 R. Dec. 327, *Re Lumley*, '94, 3 Ch. 135), that the Married Women's

Property Act was intended to preserve, and did preserve to the fullest extent, the peculiar and quasi-sacred character given by the doctrines of equity to separate estate which is subject to a restraint on anticipation. Every possible device has been tried to make the Act an instrument for circumventing this restraint, and has been tried in vain. It may be thought by some that married women have now acquired the powers of a *feme sole* without the responsibility. Such persons may console themselves by observing that a married woman's common law liability for her ante-nuptial debts is not affected as appears by *Robinson, King & Co.* v. *Lynes*, '94, 2 Q. B. 577.

Sir George Jessel once wished there was some forensic term for impudence, and the wish keeps recurring to us in reading some of the infant cases which are seldom absent from the reports. In most cases where it is a question of shares, the unconscionable infant is glad enough to get off the list of contributories. In *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* '94, 3 Ch. 589, 8 R. Dec. 228, she—it was a lady of course—wanted her money back as well. The test of her right is given in *Corpe* v. *Overton* (10 Bing. 252) and *Holmes* v. *Blogg* (8 Taunt. 508), viz. whether the infant has derived any advantage under the contract. The young lady speculator of eighteen in question had received no dividend, but her name had been on the register of the Company for six weeks. The Court failed however to discover any advantage in that. To figure on the register of a Company in imminent hazard of being wound up is indeed one of those advantages which persons have been known to pay handsomely to be rid of. *Hamilton* v. *Vaughan-Sherrin Electrical Engineering Co.* is good law, but sadly encouraging to the 'new woman'—until she comes of age.

An arbitrator may be a judge in his own cause, or in a matter in which he has obvious grounds of personal interest, if the parties to the reference have deliberately thought fit to make him so: *Eckersley* v. *Mersey Docks and Harbour Board*, '94, 2 Q. B. 667, 9 R. Dec. 342, C. A. The appellants were rewarded for their persistence by getting the unanimous opinion of six judges against them.

Mary Howitt in her charming autobiography informs us that while in Germany she observed a nail two inches in length projecting from the plank by which intending passengers passed from the shore to the boat. One after another stumbled against the nail and injured themselves or their garments, until at length there came a man who ordered the nail to be driven into the board. 'Sir! forgive my freedom,' said a man who stood by, 'but that simple

fact shows me that you are an Englishman.' It is quite true. This intolerance of abuses is certainly an English trait. But public spirit may be carried too far, even when you are fighting such an excellent cause as free water for the fixed domestic bath. In *A.-G.* v. *Vestry of Camberwell* (8 R. Nov. 227) it amounted to something like a conspiracy to defeat the law, a vestry plan of campaign. These Companions of the Bath seem to have thought that they might set the law at nought because they meditated an appeal. They seem to have been unaware that even a judge of first instance can settle the law. Or is it that familiarity with the law's kaleidoscopic changes has made the law 'disrespeckit,' as the Scots would say.

'Fancy word or words' having proved far too nebulous as a kind of trade-mark, the Legislature has in its wisdom substituted an 'invented word or words.' The theory of both these enactments is that you must not monopolize any word which is common property—current coin, but you may 'ascend the heaven of invention' and coin one for yourself, if you can. The difficulty is in saying whether there is any invention or not, just as in saying whether there is novelty in a patent. *In re Sir T. Salt's Trade Mark*, '94, 3 Ch. 166, and *In re Farbenfabriken Vormals* (7 R. Oct. 89, '94, 1 Ch. 645) are instructive on this point. 'Eboline' for instance—as the former case shows—will not do because Eboli is a town in Italy, and the addition of 'ne' does not constitute invention: nor will 'Somatose'—the subject of the latter case—because there again it is only the addition of 'e' to the Greek word σώματος (*diss.* Lindley L.J.). In other words, it is not enough to give a word 'a new hat and stick,' as Sir Walter Scott would say. But what with the extensiveness of modern vocabularies and the avoidance of anything descriptive, the invention of a good catchword demands nothing short of genius.

Lawyers have been charged before now with laying heavy burdens and grievous to be borne on men's shoulders, and they would have amply sustained their reputation in this way if the Court in *Wigram* v. *Buckley* (7 R. Nov. 136) had extended the doctrine of constructive notice of *lis pendens* to choses in action or chattels. This doctrine is part of our fast decaying real property system; it belongs to the palmy days of conveyancing, where a 60 years' title had to be investigated, and people had plenty of leisure to do it, and to hunt for *lites pendentes*. In our present hansom cab and telephone era of business, when choses in action, too, constitute a principal species of property, to extend this antiquated doctrine of *lis pendens* to all property would be simply disastrous—it would

paralyse business. Imagine, as Lord Davey says, the effect on the Stock Exchange transactions, where you do not know even who you are buying from. *Wigram* v. *Buckley* is another instance of the wisdom with which modern judges are moulding the law to meet the requirements of business. We have left behind us the days when man was considered to be made only for the law.

Debentures have been very much cried out upon of late—floating debentures, that is to say, charging a company's undertaking and all its property present and future. No sooner—it is urged—does the company get into financial difficulties and become a wreck than the piratical debenture-holders swoop down and scuttle the ship, leaving nothing for the unhappy unsecured creditors (*Davies* v. *Bolton & Co.*, '94, 3 Ch. 678, 8 R. Nov. 277). This of course is unsatisfactory, but then insolvency always is unsatisfactory, and from time immemorial the mortgagee—personified by the stage attorney—has been an object of odium. Debentures really are sometimes paid for in cash, or if not in cash, in meal or malt, and as such the *quid pro quo*, whatever it is, goes to swell the assets. The scandal is where a vendor, who has sold his property or business for an extravagant price to a company which he has promoted, is paid in debentures, and on winding up resumes his property, leaving the creditors of the company unpaid. Liquidation by debenture-holders has its disadvantages: for in such a case the debenture-holders with the frankest cynicism decline to let their property be spent on misfeasance proceedings. Thus justice is baulked.

Kant's criterion of social conduct was, 'Ask yourself what would be the result if everybody did the same:' for example, left a wheelbarrow standing in the road (*Thorpe* v. *Brumfitt*, L. R. 8 Ch. 656). The defendant in *Lambton* v. *Mellish*, '94, 3 Ch. 163, 8 R. Dec. 285, 43 W. R. 5, would fain have ignored this salutary rule of conduct. He kept his steam roundabout going night and day with organ accompaniment, and never asked himself the Kantian question what would be the effect if other steam roundabouts and organs were kept going in the same way night and day. The effect, in fact, on the plaintiff—hemmed in between the two—was, as might be expected, 'maddening.' It is satisfactory to find that Chitty J.'s exposition of the law is quite in harmony with the formula of the German philosopher, in other words, that where acts collectively constitute a nuisance each contributor is liable, though what he does taken alone would not amount to a nuisance.

Nuisances, it is evident from the cases, are a growing topic in our overcrowded civilization—noises especially. Lord Ellenborough on

a celebrated occasion ordered the tipstaff to bring 'the 46th Queen's Westminster Volunteers before him,' when the said Queen's Westminsters were noisily tramping outside in Westminster Hall to the disturbance of the course of justice. The law, like Nasmyth's steam hammer, can crush a ton of steel or crack a nut. It can commit a Corps or it can suppress, as it did in *Innes* v. *Newman* (63 L. J. M. C. 198, 10 R. Sept. 269), an urchin who insists on crying newspapers for six minutes consecutively under the windows of a harmless citizen. This conviction is good news. True, it was under a borough by-law against making 'any violent outcry, noise, or disturbance in the streets, &c., to the annoyance of the inhabitants,' but saith not the common law the same thing also? 'Experimentum fiat.' News of 'The Winner' now invades even the peaceful precincts of Lincoln's Inn, and is bawled beneath the very shadow of the Temple of Justice itself. Charles Lamb tells us that when he got a letter, or a visitor called, his writing was over for the day. Leech was the same. These may be

'The souls by nature pitched too high.'

But it is a neurotic age, and nerves must really obtain more recognition.

Even when they are the nerves of a horse. For we have yet another case of nuisance in *Jeffrey* v. *St. Pancras Vestry* (63 L. J. Q. B. 618, 10 R. Dec. 457). Ruskin, if we remember right, with his usual affluence of vituperation once described a locomotive as 'a howling, shrieking fiend, fit only for Pandemonium.' A steam roller on its travels puffing and blowing off steam yields nothing in this respect to a locomotive, and at such an apparition even a quiet well-disposed horse may be pardoned for bolting. At all events that is what the plaintiff's horse in *Jeffrey* v. *St. Pancras Vestry* did, and Charles and Collins JJ. had no difficulty in supporting the verdict of the jury finding the roller a nuisance, though the jury negatived any negligence in the management. You may paint your carriage, as Collins J. pointed out, green, brown, or any ordinary colour, but if you construct and paint it of startling hideousness, you must be prepared to pay damages if it upsets a horse's nerves. This must have been a perverse roller. For it is common experience that for many years horses, London horses at any rate, have treated ordinary well behaved steam rollers with perfect indifference.

It is not until some fragment of old law comes tumbling down that we note how it has been silently sapped by a current of judicial decisions. The reflection is suggested by *In re Brooke*, *Brooke* v. *Brooke* '94, 2 Ch. 600, 8 R. Sept. 103, and another

unreported case before Vaughan Williams J. (*In re Milard*) on executors carrying on their testator's business. The old law was that the new creditors looked to the executor alone for payment;—so I always understood the law, said Vaughan Williams J. Then came the case of a testator dedicating part of his estate to carry on his business, and with it the view that the creditors were entitled to be surrogated to the executor's right of indemnity against the appropriated fund (*ex parte Garland*, 10 Ves. 110, 119; 7 R. R. 352), and (by another step) against the whole estate, when the whole estate was embarked. Now Kekewich J. and Vaughan Williams J. have independently reached the conclusion that it does not matter whether the will contains an authority to trade or not, if the business is being properly carried on, i. e. with a view to the realization of the estate. Putting together this and *Dowse* v. *Gorton*, '91, A. C. 190—that the executor's right is paramount—we get the rather odd result that the new creditors come first on the estate—an entire *bouleversement* of the old position. If the testator's creditors want to escape being charged with acquiescence, they must get the estate administered without delay.

In *re Edwards*, '94, 3 Ch. 644, 8 R. Nov. 218, Kekewich J. considered himself bound to follow an Irish Chancery decision of 1874, cited in Theobald on Wills, but not in Jarman, without any discussion of its merits. This would no doubt have been the correct course as regards an English decision which had become current among conveyancers. But so much deference to a jurisdiction which is not really co-ordinate, or authoritative in this country, seems a little excessive. We are not aware that English conveyancers are to be presumed to guide their judgment on English titles by Irish decisions, which probably very few of them read.

The law is not so cynical as to say 'Treat every man as a possible rogue,' but it frankly recognizes the indeed undeniable fact, that there are a certain proportion of actual rogues in every community, and a still larger proportion of potential rogues—persons that is with whom 'the means to do ill deeds makes ill deeds done,' and with characteristic good sense it says to each man 'You must reckon with this social factor in your dealings, you must not merely not commit fraud yourself, but you must not facilitate fraud.' In drawing a cheque for instance, you must not—as too many are—be guilty of negligence with reference to the form of the instrument (*Young* v. *Grote*, 4 Bing. 253), for a loosely drawn cheque is an instrument of fraud. Negligence in such a case is of course

a question of fact. The bill in *Scholfield* v. *Londesborough* ('94, 2 Q. B. 660, 10 R. Sept. 297) came very near the line. The case has been affirmed in the Court of Appeal, Dec. 19.

The persistent endeavours of railway companies to make statutory penal jurisdiction created for the prevention of fraud a terror to persons who have no fraudulent intention has received another wholesome check in *Huffam* v. *North Staffordshire Ry. Co.* '94, 2 Q. B. 821, 10 R. Dec. 410. A passenger who travels with a return ticket out of date, being under an honest mistake as to its validity, is liable to pay his fare, but not to be fined, and a by-law which purports to make him guilty of an offence and subject to a penalty is bad.

We learn from the *Harvard Law Review* for December that *Fletcher* v. *Rylands*, L. R. 3 H. L. 330, which has hitherto been followed in Massachusetts, is thought to be more or less shaken by a decision of the Supreme Court of that Commonwealth. We do not well understand from the statement how *Fletcher* v. *Rylands* was involved, for the cause of action was the fall of a mill chimney under the stress of a heavy but not unusual gale. It has never been maintained, to our knowledge, that a man builds a chimney at his peril. This case would seem rather to be of the class where the burden of proof is thrown on the defendant because a thing under his control has done damage in a manner of which defective construction or repair is the most obvious explanation (*res ipsa loquitur*). An ordinary gale does not, as a rule, blow down a properly built chimney. See *Scott* v. *London Dock Co.*, 3 H. & C. 596, *Mullen* v. *St. John*, 57 N. Y. 567.

Our contemporary *The Green Bag*, of Boston, Mass., has published a highly flattering paragraph on Sir F. Pollock's book on the law of Torts. Unluckily there is *amari aliquid* withal, for the learned and friendly American writer had been reading the book in a pirated edition. English authors perhaps take a narrow and insular view, but they really do not like being pirated.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

SPECIALISM IN LAW[1].

I HAVE chosen 'Specialism in Law' as the subject on which to say a few words to you this evening, because a desire to simplify and to concentrate has been the distinguishing feature of the legal period in which we have been living, and I think that the time has now come when the value of the endeavours to obtain greater uniformity in law, and in practice, can be estimated. The well-considered effort to fuse English law, and bring together English lawyers, made simultaneously with, and perhaps occasioned by, our establishment in a common home at the Law Courts, was an important event in our legal history. Its importance, indeed, should not be exaggerated. It cannot, for example, for a moment be compared, in respect of either the difficulty of the task or the success in its accomplishment, to the legal revolution effected by Napoleon in France. It is not easy to imagine a similar blending of discordant elements, or a similar reconstitution of a legal system, in this country. Happily, the conditions for such an operation do not exist. The various provincial customs of France before the Code Napoleon exceeded in number what may be called the provincial differences of law in our country. We may be thankful that neither Ireland nor Wales have for centuries possessed legal systems different from that of England. But picture to yourselves for a moment an attempt to fuse the law of England and of Scotland. I do not profess to say how we in England should like to receive a reformation of our law from the north, because I admit that my chief knowledge of Scotch civil law is derived from the pages of Guy Mannering and Redgauntlet, and of Scotch criminal law from the pages of The Heart of Midlothian. I think, however, that if, for example, the Scotch laws of celebration and dissolution of marriages, of legitimation of ante-nuptial children, or even the general admissibility in evidence of the statements of deceased persons, were proposed for our imitation, we should repeat *Nolumus leges Angliae mutari*. I doubt, too, if the language of Scotch legal instruments would ever commend itself, either to our hearts or our lips. But I can guess how a scheme for the remodelling of Scotch law on English principles would be received in Scotland.

[1] An Inaugural Address, delivered by the Right Honourable Sir Francis Henry Jeune, President of the Probate, Divorce, and Admiralty Division of the High Court of Justice, as President of the Birmingham Law Students' Society, in proposing Prosperity to the Society, at the annual meeting of the Society held on Saturday, March 17, 1894.

The attempt to introduce episcopacy would be nothing to it. The *perferridum ingenium* of our fellow-countrymen would be up in arms. We have been lately compelled to beat a rather hasty retreat from the proposal to enact a considerable number of rules, of which a small portion encroached, or was thought to encroach, on the rights of Scotch domicile. I do not think that any English Prime Minister (whenever there be one) would be likely to provoke a conflict which would inevitably bring out a legal Wallace, and would more probably reproduce Bannockburn than Flodden. Nor do I believe that an attempt to absorb even the little legal satellites of the Isle of Man, and the Channel Islands, could be made without eliciting utterances far from the harmony of the spheres. I am afraid that in my capacity of Judge Advocate General, I have recently raised a legal storm in the Isle of Man by an attempt to take a militiaman, absent without leave, before a magistrate, under the provisions of Acts of Parliament, the extension of which to the Isle of Man is denied; but I entirely sympathize with the Manxmen, because, as a Jerseyman, I confess I think that an invasion of the privileges of that island would justify an invocation of Rollo on the grandest scale. Yet I imagine that the difficulties which Napoleon had to encounter were not less than these. But his success was complete. The various and discordant laws of France were replaced by a Code embracing all the branches of the law. That Code was accepted, and to this day it controls the affairs of Frenchmen in a way in which we find it difficult to believe that any fixed code can. It has done more. It has gone to our French fellow-subjects on the other side of the Atlantic. It has formed the basis of the law of the sister Latin race in the Italian peninsula. It has recently been transplanted to Egypt. Our legal reformation of 1873 fell far short of the political reformations of our history. The French legal reformation was a fitting counterpart to the political transformation which had taken place. In truth, it never could have been accomplished except by a man of genius in a period of revolution.

But, puny in comparison as our efforts after unity may appear, it does not follow that the difficulties were not considerable, nor that the more limited attempt was not a wise recognition of the needs of the time.

The peculiarity of the legal position in England has always been that several systems of law have prevailed at once, and over the same area. The jurisprudence of Rome presented a somewhat similar phenomenon; but it has not reappeared in any other society to the same extent as in our own. Different systems in different parts of a country under one government have, of course,

been common. In the United Kingdom, besides the Scotch and other bodies of law controlling smaller populations, but complete in themselves, of which I have spoken, customs—which, in fact, are special laws—have always existed in the City of London, in the homes of gavelkind and borough English, and in a vast variety of manors. But, at the same time, all over England there prevailed the common law, there prevailed equity, and there prevailed also that third system, born of the canon and civil law, according to which the jurisdiction of the Church and the jurisdiction of the Lord High Admiral were exercised. These different systems, though having much in common, chiefly because worked by Englishmen of the same training, and in a similar spirit, had also broad distinctions—

'Facies non omnibus una,
Nec diversa tamen, qualem decet esse sororum.'

But they were different systems, yet applicable to the same community, at the same time and in the same place.

It must be admitted that these systems have not always formed a happy family. It is, indeed, a remarkable instance, not only of the habits of thought, but of the practical good sense of English lawyers, that from the struggle which took place nearly three hundred years ago, equity was permitted to emerge the victor, and take its place beside the common law. It is not easy for us to understand why, when the common law was admittedly inadequate, and even in some cases unjust, its powers and duties were not reformed by statute, rather than a jurisdiction developed to modify old and create new remedies, under the protecting artillery of injunctions. But to improve legal remedies by Act of Parliament has never been popular in England; and though the storm that raged between Lord Coke and Lord Ellesmere rumbled on for about half a century, common law and equity, thereafter, peacefully agreed to differ. The contest between the common law and the tribunals which claimed to administer the law ecclesiastical and the law of the seas was sharper and more lasting. Prohibitions were a less rusty weapon than praemunire. In the battle which Lord Coke waged against Archbishop Bancroft and the Lord High Admiral, the royal interposition was invoked with a result more satisfactory to the common law. Recently, but only recently, the tide has seemed to turn. In the contest a few years ago between the Lord Chief Justice of England and the Dean of the Arches over a prohibition, which recalled the controversy and almost the language of the time of Elizabeth, with the characteristic difference that the rivals appealed to the public and not to the Crown, it cannot be said that the representative of the civil law was worsted. Modern

legislation has increased the powers of the Court of Admiralty and the Court of Divorce; and it is only a few months ago that the House of Lords admitted in the Court of Admiralty powers which the statute of Richard II was invoked to negative.

But I believe that, beneath these disputes of mighty names, and apparently profound issues, a humble but practical question was involved. What was, in truth, at stake was not the victory of one or other rival systems of law, but the distribution of business. The duty of any judge who did his duty, *ampliare jurisdictionem*, when fees and jurisdiction went together, was, of course, clear. The border warfare, therefore, between the rival provinces of law was naturally keen. But it was not permitted to be carried to the extinction or absorption of any one of the competitors, because the practical sense of Englishmen told them that special tribunals deal best with special subjects. The real effect of the profession of different principles of law by different Courts was to distinguish and appropriate different classes of business. To say that equity recognizes trusts, and the right to specific performance, was to assign cases involving these subjects to the Court of Chancery. To refuse to acknowledge the virtues of venue was to bring cases on the high seas into the Admiral's Court; to allow fictitious venue was to retain some portion of foreign jurisdiction for the Courts at Westminster. To deal with marriage otherwise than as a civil contract was to assign divorce to the ecclesiastical judges. It has, indeed, been claimed that the distinction of Courts rises to the rank of a principle. 'Omnino,' said Lord Bacon, 'placet curiarum separatio. Neque enim servabitur distinctio casuum, si fiat commixtio jurisdictionum; sed arbitrium legem tandem trahet.' It is perhaps true that an imperfectly informed tribunal is apt to fall back on the light of nature that is in it, and call the process deciding according to common sense. But we may be content with the belief that for practical reasons the separation of Courts has ever commended itself to the minds of Englishmen.

It is obvious, however, that such separation of Courts might in some cases lead to hardship. If a man's adviser knew into which category his client's case fell, and the whole of it did so fall, all went well. But sometimes he did not; sometimes the case involved more than one class of subjects; sometimes in its course it developed fresh aspects. It was not pleasant to hear that under such circumstances the suit must be recommenced. Of course the client was told that the wisdom of the law required his sacrifice, but probably in few instances was his spirit sufficiently chastened to appreciate the consolation.

It has always seemed to me that those who devised the legisla-

tion inaugurated by the Act of 1873 had in view, with singular clearness, the essential merits and demerits of the system which they were remodelling; and also that, where they went beyond the remedies for which those defects called, time, and the silent action of practical experience have led, and are leading us, back to the right path.

The combination of all the high tribunals of the kingdom, the union of what I have called the sisters of common law, equity, and civil law, together with their statutory relative the Court of Bankruptcy, into one Supreme Court of Judicature, effected by a single section, was striking in form and effective in operation. It was intended to remove once for all, and it did remove, the scandal of the suitor hunted from Court to Court. It is possible that in some cases permission to reconstruct his proceedings, on the terms of payment of costs, left him, if he only knew it, much where he was before. But in many instances substantial injustice was averted, and in all a right principle was affirmed. There are, however, two things in the Act of 1873 which seem to me to show how true it is that a distinction of legal systems was in truth only a division of legal subjects. The first of these is the extreme smallness of the change which was really made in the law of each set of Courts. It was, indeed, provided both by reference to some special points, and in what looks like a far-reaching section, that, when equity and common law conflict, equity should prevail. But has this provision been so potent? Long before it, equitable pleas were allowed, about which, if I may recall my pleading days, the chief conviction in the minds of common lawyers was that they were not law[1]; and, since 1873, I have seldom heard of the authorities of the Queen's Bench Division concerning themselves with recondite doctrines of equity, except to disclaim acquaintance with them. Beyond this introduction of equity into the Courts of common law, which has come to so little, what was there? Practically nothing, I think, except the introduction into the common law of the Admiralty rule as to damages in cases of collision between ships—a provision of interest, because it recalls the candour with which Lord Selborne permitted his strong opinion to be changed by discussion, but not very important, as the Queen's Bench Division seldom tries collisions between ships. The second point I desire to notice is that the Act of 1873, in the moment of unifying the law, affirmed the necessity of separation of tribunals. This was called assigning certain special matters to each of the Divisions. It was, in fact, doing formally what English lawyers had always

[1] [My impression is that on the north side of Fleet Street they were not always recognized as equity.—Ed.]

done practically, and performing homage to specialism in the administration of the law.

The limits of the new scheme were not at first perceived, perhaps not even by its authors. I believe the expectation was cherished, by the best informed, that in future every pleading would be identical in form, every case follow the same procedure, and every judge deal with every subject. Some of us remember the jury-box which appeared in the Court of the Master of the Rolls in the glory of new paint and lettering; probably more of us recollect the Judges of the Chancery and Probate Divisions assuming robes of scarlet and exercising the functions of Judges of Assize.

But though the unity created has by no means been wholly theoretical, and, even if it were, would not be without advantages, it is a significant tribute to the utility of former methods that hardly was the new *régime* inaugurated, when the features of the old reappeared. The former landmarks speedily emerged from the subsiding flood. It was said that the process was hastened by practical difficulties which had not been anticipated. It was remarked that the highest exponents of equity despaired of insensing common, or even special, jurymen with its choicest doctrines. It was whispered that one eminent Chancery Judge on circuit expressed his astonishment that a wife was not called to prove her husband's innocence; and that another discerned a crucial significance in the sanguinary epithet applied by a prisoner to his jacket. These were, no doubt, the myths of a freakish fancy. But they have outlived the system which they were supposed to illustrate. Equity judges and juries on circuit, and elsewhere, have bidden each other a long farewell. The pleadings of common law and of Chancery, though divested of some of their formalities, retain their distinctive characteristics. Common law chambers, with the Master and the Judge, are much what they were. Chancery chambers still, I understand, enshrine the mysterious union of the Judge and his Chief Clerk. I am not aware of any substantial change that has taken place in the procedure of Probate, Divorce, or Admiralty. In the trial of facts, the common law, though to a less extent, still clings to juries; the Chancery Division still, though to a less extent, welcomes affidavits; and in the Admiralty Division, the Elder Brethren of the Trinity House still sit beside the Judge, and the Registrar and merchants still assess the amounts which his judgments leave for their determination. In short, the various systems have borrowed some things from each other, have even in some things imitated each other; but when we pass by names and look at facts, we find the lines of demarcation almost as clear as they were to the master-minds which drew them.

Perhaps, after this, I need hardly say that in my humble opinion, specialism in the administration of the law is no defect. But I desire to limit myself to little expression of my own opinion, and rather to suggest to your reflections in the course of your reading and practice, whether tribunals, at any rate those concerned with the most important business, do not best perform their functions by a restriction of the classes of subject with which they deal. It should be at once admitted that the general jurisdiction exercised by the County Courts has exhibited the aptitude and versatility both of judges and practitioners in a remarkable degree. There have been few more successful experiments, or it may be revivals, than the establishment, all over the country, of economical and expeditious tribunals, and the extension of their powers to Equity, Bankruptcy, and Admiralty has not detracted from their efficiency. Perhaps, indeed, the time has come when the limits of their common law powers, which have been allowed to remain below those of their other functions, should be raised. But I would suggest to you that there is a distinction to be drawn between Courts dealing in the first instance with the mass of the current business of the country, and those constituted for the discussion of cases of exceptional importance, either from their magnitude or novelty. This should be, and broadly speaking it is, the distinction between the County Court and the Supreme Court. The characteristic function of the one is to administer the law; the characteristic function of the other is to declare, or, it may be, to make it. I do not say that either tribunal always acts up to its character. But what institution or individual does?

I should put the advantage of tribunals being confined to special classes of subjects, mainly, on two grounds—speed and consistency; and we may look for the manifestation of these virtues alike in judges and practitioners. Many of my audience know already, and the remainder will, I am sure, discover, that practitioners and judges are very much what they make each other. It is not apt to lead to satisfactory results when the advocate is much better equipped than the judge. The eventual decision may not be wrong. Well-informed advocates are always considerate, especially if their knowledge is not recent, and often have the gift of exposition. A judge may discreetly hold his tongue, and allow wisdom to linger till knowledge comes. If Lord Campbell had not recommended such a method of enlightenment to Lord Chancellors, I should have hesitated to add that the faces of bystanders may be usefully consulted. But an argument under such circumstances is not edifying: certainly it is not likely to be productive of those phosphorescent hints and observations which sparkle along the path

of an effective discussion, and glimmer into the dark corners left for future litigants to explore. The spectacle of a judge who knows much more than the advocate before him is more impressive; but I am not sure that the decision is not in greater peril. But when judge and practitioner are both well acquainted with the existing law, and each is keenly observant of the dividing line between tried ground and possible quicksand, then comes a trial worthy to be heard and remembered, an argument occupying the least necessary time, and a decision based on sound principles, and advancing the law. I do not say that economy of time may not degenerate into parsimony. I once heard an argument, complete to the initiated, which consisted in the ejaculation of the title of one case by the leading counsel, and the response of another by the judge. The judgment which instantly followed pointed out the reasons why the latter authority had the judge's preference. I do not advise that all arguments should be so concise. But compare such an administration of justice with the prolonged throes of a tribunal struggling worthily but futilely towards a judgment. What searchings of mind, and sending for books; what whirling words, and dazing thoughts ensue, when no one is self-confident what suggestions are fruitless, or where the real point is to be sought. One is reminded of Mr. Stanley, laboriously wandering nowhither, through sunless forests, with pygmies for guides.

Let me add a word on the rights of our posterity in this matter. We owe it to them to develop the law, as past ages have developed it for us. It is possible that some persons, though not, I believe, many, conversant with both systems, may prefer the crystallization of law in a code to its daily growth by argued instances. I confess that a code always seems to me like a travelling medicine-case, very neat and portable, but hardly adequate to cope with all the complex ills of humanity. But if law is to be made by decisions, it must, I think, be admitted that it is by the hands of great specialists that the work has been, and is, best done. The evolution of mercantile law, due to Lord Mansfield, was the result of his sitting day by day, and year by year, at the Guildhall, to hear the same class of cases, with almost always the same practitioners, and, it is said, generally the same jurymen before him. The construction of the system of equity, effected by Lord Nottingham, was the result of a man of vast ability and industry devoting himself to that particular branch of jurisprudence. If I may refer to a more modern instance, I should say that Sir Cresswell Cresswell, who devoted his consideration to the law of Probate and of Divorce, at a critical period of its existence, was

thus enabled to lay down and develop principles and practice, of which time has proved the value.

I had hoped when I chose my subject to refer, not only to specialism in law, but to specialism in lawyers; and to carry on the train of thought which I have ventured to place before you, into considerations connected with training for the law, and the pursuit of its practice. But, as frequently happens, my subject grew under my hand, and I must turn away. I will only say that no lawyer, be he student or practitioner, can be either too much of a general lawyer, or too much of a specialist. Lord Bacon said that he took all knowledge for his province. No mental digestion can hope to assimilate the whole *corpus juris*. But in, or nearly in, the sense in which, I take it, Lord Bacon employed his phrase, it is quite possible to grasp the principles which underlie all branches of law, and to follow out the relations of those branches to each other. To do this is to be a good general lawyer. But I venture to think that no student has gone as far as he can and should go, until he has thoroughly mastered some one branch of law. Such a study does more than give a grasp of that particular subject. English jurisprudence is so interwoven, that to be well acquainted with one part is to be not ill acquainted with many others. I might place this recommendation to you on the most practical grounds. To know, and to be supposed to know, one subject better than any one else, is no bad passport to success. There is a proverb, 'Beware of the man of one book.' I should say, beware of an antagonist with a speciality. But I venture to urge on you such a study, in the interests of something which success does not always give, but which failure cannot take away; in the interests of that keen appreciation of legal problems and their solution, which adds an intellectual charm to our daily work, and to which even the driest cases of our practice may be made to contribute. And I propose to you the welfare of this Society, as one having for its main object, to promote a scientific study of the law, and thus to implant and propagate a zeal, thoughtful and energetic, for the highest aims of our great profession.

F. H. Jeune.

EXAMINATION AND CROSS-EXAMINATION AS TO CHARACTER.

THERE is, perhaps, no branch of our law which stands so much in need of codification as the Law of Evidence.

A long string of arbitrary rules takes the place of a systematic arrangement, on scientific principles, of statutory enactment and judicial decision; and although there is much rough fairness in the matter of the law, there is much that is anomalous and glaringly unfair. Nowhere is this more strikingly apparent than in that division which relates to Character. I purpose, as briefly as the largeness of the subject will permit, to consider the system of legal rules which constitute the Law as to Examination and Cross-Examination as to Character, with reference only to its main provisions and its so-called rational basis.

To point out defects is the province of the critic, to remedy them is peculiarly the duty of the legislator; therefore I do not intend, more than is absolutely necessary in order to the proper consideration of my subject, to suggest alteration or advocate change.

I would also premise that I intend to deal with 'Character,' as bearing upon both civil and criminal cases.

The general and primary rule of the Law of Evidence is, that nothing shall be given in evidence which does not directly tend to the proof or disproof of the matter in issue, and this rule holds good, with one important exception, which may be styled Evidence as to Character. But there are other *apparent*—though not real—exceptions, one or two of which necessitate some discussion before I turn to the subject proper.

Facts supplying motive, or constituting preparation for an act, or subsequent conduct apparently influenced by the doing of the act charged against a certain person can be given in evidence, in all criminal cases and certain cases of Tort; and it is sometimes urged that these facts do not tend to the proof or disproof of the matter in issue, but merely introduce prejudicial matter and serve the purpose of attacking the character of a prisoner or party to an action.

But this view is a distorted one, and is founded upon an inadequate appreciation of the Principles of Jurisprudence. That this is

so is abundantly clear when one reflects that the object of a trial is to arrive at the degree—if any—of a particular person's connexion with a particular act or omission, and that *motive*,—if reasonably capable of leading to the specific act or omission; *preparation* and *subsequent conduct* constitute three links out of four in the chain which binds the particular person to the particular act or omission; and it should further be borne in mind that the point in direct issue is not the evil reputation of the particular person, but his responsibility for an act or an omission which cannot be regarded apart from the circumstances in which the particular person was at a given time situated.

Therefore, it *is* necessary to admit evidence of any fact which serves to directly connect the particular person with the particular act or omission, no matter whether it be motive or conduct which can be regarded as a reasonable consequence of the act or omission. The jury are empanelled to test the importance of the evidence, and it is their duty to pronounce upon the significance of the various facts put before them under and by the authority of the presiding judge.

The case of Affiliation Proceedings is another instance of an apparent exception to the general rule. In such cases the defendant can cross-examine, and can contradict the evidence of, the plaintiff, with the object of showing that about nine months before the birth of the child in question, she, the plaintiff, had sexual intercourse with another man who might naturally be the father of the said child.

Now, it is very clear that such examination and cross-examination are not directed to impair the credit or destroy the character of the plaintiff, but are concerned with the real matter in issue, which is the paternity of the child. If the defendant can show that any other man equally with himself—assuming he admits having had sexual intercourse with the plaintiff—might naturally be the father of the child, he cannot be fixed with the paternity. Here, therefore, the main issue is concerned with the plantiff's chastity, her personal conduct being directly in issue.

Another instance is the action for Damages for Seduction,—where the seduction is followed by the birth of a child, or at least by pregnancy, for in other cases, such as illness arising from the act of intercourse, it would for obvious reasons be difficult to cast any particular person in damages, and consequently many of the rules applicable to the first-mentioned case could not apply.

In this case[1], the defendant is permitted to cross-examine the woman whose seduction is in question, and contradict her by

[1] *Verry* v. *Watkins*, 7 C. & P. 310; and see *Eager* v. *Grimwood*, 1 Exch. 61.

independent evidence as to fact, time, date and place, for the purpose of showing that although he had sexual intercourse with her, he was not the father of her child, and in cases where illness follows pregnancy not resulting in the birth of a child, that he was not the cause of such illness, but, that a third person was the father of the child, or in the case of pregnancy and subsequent illness only, the cause of the illness.

Here, again, the evidence as to chastity goes right to the main issue, and is not adduced for the purpose of wrecking credit or character.

In this connexion, it is somewhat curious to note that in the case of *Reddie* v. *Scoolt* [1], Lord Kenyon non-suited a plaintiff who sued for damages for the seduction of his daughter, because he had allowed the defendant, *who, he knew, was a married man*, to visit and go alone to the theatre with his daughter. This seems to have been a correct decision of the learned judge, on the ground of estoppel by conduct. It is, however, suggested in Roscoe's N. P. Evidence, that the facts in this case might properly have been given in reduction of damages, but did not afford grounds for a non-suit. It is indeed difficult to deal with such a suggestion seriously, for in this case there was no question of 'character,' and indeed I venture to assert that in no action for seduction can the conduct of the *nominal plaintiff* be material to the claim for damages; but there was a question of conduct conducing to the commission of the tort, and if Reddie had merely been, as it seems probable that he was, exceedingly simple, the judge would have done right in non-suiting him.

I should add that it is true that Lord Kenyon found the foolish father guilty of 'gross' misconduct, but 'gross' is probably merely vituperative.

And as to actions of Defamation. I shall deal with them in another part of this article, in so far as the issue is the measure of damages; therefore it is only necessary to say here, that when the main issue of an action of defamation is general reputation, the issue can be fought, and is properly fought, by calling evidence or cross-examining as to character [2]. In other words, where general character is in issue, evidence of general reputation can be adduced.

Of course I am not concerned with actions founded on specific misconduct, for there the question is the truth or untruth of a definite allegation and not character.

In all the cases I have already dealt with, and indeed in every other civil case, except those which I shall presently mention, it is

[1] *Reddie* v. *Scoolt*, Peake, 239; and see *Hodges* v. *Windham*, Peake, 39; 3 R. R. 649.
[2] *Foulkes* v. *Sellway*, 3 Esp. 236.

abundantly clear that what is sometimes termed cross-examination and examination as to character is nothing more than a mode of fighting the general issue.

And now I come to the question of 'Character' itself, and at the outset I am confronted with a difficulty which arises from the use by lawyers of the word character in both its strictly legal sense—*general reputation*—and its popular sense—*disposition*. This difficulty I will briefly deal with.

Every lawyer knows that it is trite law that unless the prisoner—I speak now of criminal cases—offers evidence of his good character, his bad character is irrelevant to the issue which is being tried.

His character is not deemed to be in question, and yet, despite this excellent and most salutary rule, there are a large number of cases in which the Crown can adduce evidence, not only of previous and subsequent wrongdoings[1], but also of previous convictions[2] of the prisoner. In other words, where it is requisite to prove a guilty knowledge, a mass of evidence to prove such *knowledge* is let in, and the whole of the evidence, so made admissible, refers to the disposition of the prisoner, and tends to show that he is a *likely man* to commit the particular offence; e.g. receiving goods, knowing them to have been stolen.

Now this seems to me to be perfectly indefensible, for there is no question here of proving intent,—which as being a part of a criminal act it is quite justifiable to do,—but in the most barefaced manner the Crown, on the trial of a prisoner on one charge, asks the jury to pronounce judgment on a variety of past offences and wrongdoings of which the unfortunate prisoner is or has been proved to be guilty. Such a practice, I maintain, is theoretically absurd and practically indefensible, for, putting aside the ludicrous folly of inviting the typical juryman to work out the most delicate and subtle of metaphysical problems, one man has enough to do to answer one charge at one time; and further, to ask a jury to find a prisoner guilty of a specific charge because he has done wrong on previous occasions, is positively cruel in its injustice.

The provisions of 34 & 35 Vict. c. 112. s. 19, which legalize the practice, are a monument to the wrong way of doing things, and it is hard to believe that a *lawyer* could have taken part in framing them. That a man is presumed to be innocent until he is proved to be guilty, is a maxim one hears much about, and it is a matter for wonder and regret that those who admire its spirit, do not make strenuous efforts to ensure the fair trial of every prisoner.

[1] E.g. *Reg.* v. *Salt*, 3 F. & F. 834.
[2] *Reg.* v. *Weeks*, L. & C. 18; and *Reg.* v. *Frith*, L. R. 1 C. C. R. 172.

It is boasted that a jury are sworn to pronounce on the evidence submitted to them in relation to one issue, but in many cases they sit to decide if the disposition of a criminal is likely to lead him to commit certain crimes!

Now leaving this point and coming to the consideration of the *general reputation*, which the law ostensibly considers to be a convertible term with character—although it does sometimes use the word to signify disposition—it may be asked—and not impertinently—what reason is there in allowing witnesses to character to give evidence[1]? It may well be asked, for except in Rape, and analogous cases, and certain actions for damages, those witnesses simply prove nothing, since in the first place they are only permitted to speak *generally*, and are not allowed—except in cross-examination—to give reasons for their belief; they must not descend to particulars and are not permitted to speak of their own knowledge. In fact, as Sir James Stephen points out, in his work on the Law of Evidence, a witness who knows that a man to whose character he is called to testify is a habitual receiver of stolen goods, can, if the prisoner is a hypocrite and possesses a good reputation, with perfect truth give him the highest character the law tolerates. I do not say that witnesses who would give information as to the past conduct of the prisoner might not be of some service to the judge after verdict returned, and assist him in meting out punishment, but they would not, even then, if they had to answer the ridiculous question in the ridiculous manner which is prescribed. Sir James Stephen says that in practice, the question 'What is the general reputation of the prisoner as a humane, honest and moral man?' is answered particularly, and not as directed in the leading case of *Reg.* v. *Rowton*. Well, that may be, but it is not legal all the same, and a verdict obtained on an answer purporting to give the personal opinion of the witness would undoubtedly be upset; and further, if anything *is* to influence the jury, it surely should be the disposition of the prisoner, and not his reputation, no matter how unerring popular judgment may be!

But as I have before said, what has disposition to do with a particular offence? Is it not, humanly speaking, absurd to ask a jury to find a man not guilty of embezzling the funds of a Building Society, because he has hitherto borne a good reputation? Assuredly so, and yet it is done almost daily. And what is the practical result of the system?

Bad, even ludicrous! Since there is no man so poor as not to

[1] *Reg.* v. *Rowton*, 1 L. & C. 520; *Reg.* v. *Turberfield*, 34 L. J. M. C. 20; *Scott* v. *Sampson*, 8 Q. B. D. 471.

be able to afford a witness to character, and the worst murderer and most brutal violator of children never lacks a friend who will speak for him in the hour of need. The jury—save on the rarest occasions—pay no attention to such witnesses, and why it is allowable to take up the time of the court in dealing with them passes my power of comprehension. It is as unreasonable to ask a jury to acquit a bigamist because he has hitherto borne a good character, as it is cruel to ask them to convict a man of 'receiving,' because in a state of semi-starvation four and a half years ago he stole a halfpenny bun. And yet, the law on the subject is accurately illustrated in the foregoing paragraph.

Now just a word on the cross-examination of witnesses.

Many people—drawn mainly from the ranks of the educated semi-learned class—think that witnesses should be protected, but it is hard to see what they should be protected against! Surely the most stupid peruser of the daily papers knows that—except as to character—the witnesses in any case depose to facts in issue or relevant to the issue, and their evidence rests on their own oaths. On their statements the party calling them relies to gain his verdict, and it is only common fairness that the other side should have the right of testing their credibility and credit.

The basis, the strength of a man's testimony is his character,—here again character is used in its popular and not strictly legal sense,—i. e. his disposition, and acts being the only external indices of the disposition, the jury should be placed in possession of them. The issue here is not the guilt of *A* or the innocence of *A*, but whether or no *B* the witness is credible. If *A*'s guilt were in direct issue, *B*'s opinion of him and *A*'s previous reputation or disposition as evidenced by conduct, should be left out of all consideration, for it is the jury who are to judge on the facts connecting *A* with the act or omission in question, of his guilt in reference to a particular charge. It is agreeable to reason that every witness should be tested, but it is unreasonable in the highest degree to allow witnesses to be called who shall swear generally that, in their opinion, founded on their own knowledge of a particular witness, the particular witness is unworthy of credit on his oath. This however it is permissible to do, and not only can witnesses be called to impeach the credit of witnesses impeaching credit, but fresh evidence can be adduced to rehabilitate the credit of the witness impeached. I append an illustration of what is legally permissible and is sometimes acted in criminal courts.

A prisoner (charged with simple larceny) calls *A* to prove that he, the prisoner, is a man of good reputation, i. e. sound character. The question which the prisoner is entitled to ask his witness is,

'What is my general reputation as a moral, honest man?', and the witness's proper answer is, although he knows that in spite of a good reputation, the prisoner is in reality a disreputable thieving voluptuary, 'your character is excellent.' The Crown then puts in a previous conviction against the prisoner, [N.B.—This course can be taken in almost every conceivable case if the prisoner has been previously convicted], and calls a witness to prove that the prisoner bears a bad reputation, i. e. bad character. When the Crown has concluded its evidence of bad reputation, the prisoner at once calls a witness to swear that from his knowledge of the Crown's witness, he would not believe him on his oath[1]. The Crown then calls a witness to swear that the reputation of its impeached witness is good, and that he is worthy of credit, and another witness to swear that the impeaching witness is unworthy of credit,—and this performance may be carried on *ad infinitum*.

This illustration supplies in itself all necessary comment, but it may be as well to sum up the existing rules on the subject by saying, that, in every case, both civil and criminal, the credibility and credit of a witness may be impeached, whereas the character of the defendant, unless it constitutes itself the main issue, is only relevant in criminal cases and certain civil actions for damages.

The rule as to contradicting witnesses who have in cross-examination been asked questions which were put solely for the purpose of impairing their credibility, is that except in two cases no evidence to contradict is admissible. The two cases—I quote from Sir James Stephen's work on Evidence—are

(1) 'If a witness is asked whether he has been previously convicted of any felony or misdemeanour, and denies or does not admit it, or refuses to answer, evidence may be given of his previous conviction thereof[2].'

(2) 'If a witness is asked any questions tending to show that he is not impartial, and answers it by denying the facts suggested, he may be contradicted[3].'

Here again I submit that it is logically absurd to ask a jury to infer that a man is not entitled to credence, because he has been convicted of a felony or misdemeanour, and the statutory enactment on the subject seems to be, and is, in practice, found to be, pernicious. Its absurdity is apparent when one remembers that to send by post a pair of scissors which is not properly protected is a misdemeanour. As to the second case; there seems to be no objection to the rule contained in it, for after all, it merely amounts to cross-

[1] *Reg.* v. *Brown*, 1 C. C. R. 20.
[2] 28 & 29 Vict. c. 18. s. 6.
[3] *A.-G.* v. *Hitchcock*, 1 Ex. 91.

examining a witness with reference to facts, on the evidence of which and their tendency the jury may decide.

But to deal with those criminal cases in which character is *properly* deemed to be a matter of great importance, and wherein, although it is not generally admitted, one of the issues is character,—using the word in its popular sense.

The cases are rape; assault with intent to ravish; and indecent assault amounting in substance to an attempt at rape. In all these cases the prisoner may adduce evidence that the prosecutrix is a woman of generally immoral character, or is a common prostitute, and this he may do whether she is cross-examined or not as to her previous conduct and mode of life [1]. If she is cross-examined, she can be asked, whether she has had at any time illicit connexion with a man other than the prisoner, and probably can be compelled to answer, but if she denies it, she cannot be contradicted [2]. But if she denies that at any time previously to the occasion charged she had connexion with the *prisoner*, she can be contradicted. The reason for this distinction was given by Lord Coleridge in *Reg.* v. *Riley*. He said, as to the first case: 'It should in my view be rejected, not only upon the ground that to admit it would be unfair to the woman, but also upon the general principle that it is not evidence which goes directly to the point in issue at the trial . . . . It is obvious too that the result of admitting such evidence would be to deprive an unchaste woman of any protection against assaults of this nature;' and as to the second case: 'To reject evidence of her having had connexion with the particular person charged with the offence is a wholly different matter, because such evidence is in point as making it so much the more likely that she consented on the occasion charged in the indictment.'

Kelly C.B., in *Reg.* v. *Holmes*, stated that evidence as to the prosecutrix having previously had connexion with the prisoner was admissible, 'for it has a direct bearing upon the question of consent,' but that cross-examination as to connexion with others was 'as to a collateral point.' These *dicta* represent all the reason there is for the distinction; and now briefly to examine the distinction which is most profoundly arbitrary, and so fine that the more acute the perception the harder it is to appreciate. What is the main question to be tried in a case of Rape? *Consent*. What is the issue when the act of connexion has been proved? 'Did the woman *consent* to have sexual intercourse with the prisoner?' The prosecutrix says No, and the prisoner says Yes. There are seldom any witnesses

[1] *Reg.* v. *Riley*, 18 Q. B. D. 481; *Reg.* v. *Clarke*, 2 Stark. 242; *Reg.* v. *Holmes*, L. R. 1 C. C. R. 334.

[2] *Cundell* v. *Pratt*, Moo. & M. 108; but see *Reg.* v. *Cockroft*, 11 Cox, 410.

of the occurrence, and as the jury have to decide upon probabilities rather than facts, character—in its popular sense—becomes a very important matter, for the disposition or profession of the prosecutrix supplies the jury with material to work upon. It would be better if the jury could, on circumstantial and direct evidence as to facts, found their verdict—which they can well do in cases where 'guilty knowledge' is charged; but in nearly every rape case, the nature of the case does not allow them to do so. It is necessary in rape and the analogous cases to work on probabilities, and the mode of life of the prosecutrix is an all-important index to those probabilities. Now, having admitted that evidence as to disposition is necessary in these cases, why, in the name of common sense, should any distinction be made in what I have termed the first and second case in Lord Coleridge's judgment?

In the second case: the prosecutrix can be contradicted, because it is so much the more likely that she consented, &c.

Lord Coleridge in saying that overlooked the fact that this reason exists also in the first case with nearly as much force as in the second.

Is not the whole soul of the reason for admitting evidence in contradiction centred in the assumption that a woman who has been immoral once is more likely to be immoral again than a purely virtuous woman? And if such is the case, which few if any will deny, of what importance is the personality of the paramour except in so far as there is a question of *degree* of probability.

But there is another ground for the distinction, it is said, which consists of the hardship of starting upon the prosecutrix a 'multitude of collateral issues.'

Well, there is not much in that 'ground,' seeing that consent is one of the two vital issues in rape. But even supposing it were not, surely such hardship as is involved in setting the prosecutrix to answer collateral issues is more than counterbalanced by the protection the practice would afford against the tribe of blackmailers: and I venture, with diffidence, considering the eminence of those with whom I have the misfortune to differ, to assert that character, i. e. disposition, in a case of rape is not a collateral issue, but *the* issue, when the fact of connexion has been established.

Therefore all evidence relevant to that issue should be admissible, and any statement made by the prosecutrix as to consent should be freely and fully investigated. The character of the prosecutrix being the key to the probability of her story, should be examined with the utmost care. On this view, I quote the words used by Mr. Justice Williams in the case of *Reg.* v. *Martin*[1], with which

[1] *Reg.* v. *Martin*, 6 C. & P. 562.

I respectfully and entirely agree. 'The doctrine that you may go into the general bad character of the prosecutrix and yet not cross-examine as to specific facts, I confess, does appear to me not to be quite in strict accordance with the general rules of evidence.'

Before I proceed to deal with character in reference to damages in civil actions, I will advert to a most curious case, which it is difficult to arrange under any head, but which it is proper to include in an article on examination as to character. It is that of *Provis* v. *Reed* [1].

There the character of a dead man, who was one of three attesting witnesses to a will—which as solicitor to the testator he had prepared—was attacked, with the object of showing that the particular will was a forgery, and that the deceased had been an active participator in a gross fraud. The point in issue was the validity of the will, and Mr. Justice Gaselee admitted evidence to prove that the deceased attesting witness bore a very high character, and his ruling was upheld by Best C.J., Park J., and Burrough J.

The ground for admitting the evidence was thus given by Best C.J.: 'In such a case' (namely one, where the action was brought twenty-seven years after the transaction to which it related), 'there is no way of protecting the character of a witness other than the admitting such evidence as has been here received.' 'In many cases necessity forms the law, . . . the common practice of Westminster Hall has always been to receive it';—(i. e. evidence as to character). 'That practice, perhaps, is better evidence of the law even than decided cases.' This was how Best C.J. reconciled Mr. Justice Gaselee's decision with Law, but it is impossible to defend this and similar decisions on any principle of law, and as for 'necessity,' it may know no legal limits, but the bounds of absurdity should surely restrain it. It certainly crossed those bounds in the case of *Provis* v. *Reed*. The objection to such evidence I have given already in this article.

In civil cases the character of the plaintiff, though generally irrelevant, is sometimes a very material question. I have before spoken of those cases in which the main issue is character, and now I will deal with those in which character is of extreme importance, as affecting the measure of damages.

A full list of cases in which evidence of general bad or good character may be given, is libel, and slander, where character is not the general issue; seduction ('malicious prosecution' was, but is so no longer) [2]; breach of promise of marriage; and two cases in

[1] *Provis* v. *Reed*, 5 Bing. 435; see also *Doe* d. *Walker* v. *Stephenson*, 3 Esp. 284, and the *Bishop of Durham* v. *Beaumont*, 1 Camp. 210.

[2] *Rodriguez* v. *Tadmire*, 2 Esp. 721; and *Newsam* v. *Carr*, 2 Stark. 70.

connexion with wills. And first in actions of Defamation: the plaintiff cannot adduce evidence of general good character, unless and until either evidence of general bad character has been adduced by the defendant, or the defendant has cross-examined the plaintiff's witness *successfully* as to plaintiff's bad character[1].

It is however doubted whether an unsuccessful cross-examination as to character does not entitle a plaintiff to give evidence of general good character, but after careful consideration, I have come to the conclusion that it does not.

In an action for damages for Seduction, the nominal plaintiff is not the woman who has been seduced, but the master of the woman who sues on account of the damage he has sustained by the loss of his servant's services. Therefore, in this action, the general bad character of the 'servant' may be given in evidence by the defendant, and if he adduces such evidence, or proves by cross-examination, that the 'servant' was not of good general character, the plaintiff then, and only then, can give rebutting evidence of his 'servant's' good character[2].

The character of the plaintiff is, I submit, not material on the question of damages, although some of our judges presumably think it is. It is, however, inconceivable to me why the fact that *A* has been fined for 'sleeping out' should diminish his interest in his 'servant' and lessen the value of his servant's services to him, and arguing from first principles in the absence of authority, I have come to the above conclusion[3].

In actions for damages for Breach of Promise of Marriage, where the defendant by his plea sets up a general charge of immodesty, the plaintiff may, before she is even cross-examined on the point, give evidence of her general good character for modesty[4].

Now in all the foregoing cases, character, i.e. reputation, is in issue, since it touches the damages. In defamation cases, the complaint that the plaintiff makes is that his reputation is wounded: he seeks money compensation for the partial, if temporary, injury that has been done to his *existimatio*.

'I am a man of good character,' he says in effect, 'and the defendant has, as you have found or been told, made an unjustifiable attack on it.' His reputation is the basis of his grievance, and the higher it is, the more sensitive it is, and the greater, in proportion to the hurt done it, is the injury the owner has received. It is quite reasonable then, that the defendant should be allowed to offer

[1] *King* v. *Francis*, 3 Esp. 116.
[2] *Dodd* v. *Norris*, 3 Camp. 519, 14 R. R. 832; but see *Bate* v. *Hill*, 1 C. & P. 100; *Bamfield* v. *Massey*, 1 Camp. 460.
[3] *Reddie* v. *Scoolt*, Peake, 240.
[4] *John* v. *James*, 18 L. T., N. S. 243.

disparaging evidence of the value of that reputation, and it is only fair that the plaintiff should be allowed to adduce rebutting evidence.

On either side there should be no restrictions placed, and yet there is, for unless the defendant justifies, he cannot without the leave of the judge give evidence of bad reputation if he has not, at least, seven days before the trial, given notice to the plaintiff, and furnished him with particulars of the matters as to which he intends to give evidence[1]. And not only should there be no restriction placed on the parties, but the defendant should be allowed to give evidence of particular instances of misconduct, in order to attack the character of the plaintiff.

It is beside the mark to say that the plaintiff would have too many issues to contend with, for *the* issue as to damages in a defamation action, is the *value* of the particular character which has been attacked. I am not now considering special damage, which is in itself another issue, distinct from that of general damages. Evidence of mere rumours and suspicions should certainly not be admitted, but *facts* which tend to detract from the plaintiff's reputation and are indisputable can for no good reason be excluded.

The restrictions enumerated by Mr. Justice Cave in the case of *Scott* v. *Sampson*[2] should speedily be removed.

In the cases of seduction and breach of promise also, pretty well the same considerations apply, but hardly so strongly in the second as in the first case. However, the difference, if any exists, is but slight, and there is very little of the comment made above on the law relating to character in defamation cases that is not equally applicable to both.

I have now dealt as fully as within the prescribed limits it was possible for me to do with this important subject. I fear that I can hardly lay claim to credit for having made generally interesting an article which, by reason of the magnitude of the subject, is necessarily sketchy, and which, overlaid as it is by technicalities, cannot be anything but 'dry'; but if I have clearly put before my readers the necessity of alteration, radical and sweeping, in the body of the Law of Evidence, my object has been attained. Whether my strictures are deserved, whether they are well founded, is a matter which can bear but one opinion. As to the necessity of the irrationality of the rules, there may be a diversity of opinion. For my own part, I am optimistic enough to think that some good may be effected by one who possesses sufficient influence and ability to bring about all necessary changes in the law as it now stands.

ERNEST BOWEN-ROWLANDS.

[1] R. S. C., O. 36. r. 37.

[2] *Scott* v. *Sampson*, 8 Q. B. D. 491.

SUGGESTIONS FOR THE CODIFICATION OF THE LAW OF GENERAL AVERAGE.

IN a paper read last May before the Committee of Lloyd's, Mr. Douglas Owen advocates the possibility and the expediency of abolishing general average. The Committee of Lloyd's is strong, but it may well be doubted whether any Committee, however strong, could by a resolution put an end to a legal institution that is coeval and coextensive with modern and mediaeval as well as to some extent even with ancient civilization. The expediency of abolishing general average is even more questionable. It is urged on the ground that a great insurance company contributes to general average as much as it receives from general average, which is no doubt true; but Mr. Owen goes on to say, as for the sake of his argument he is bound to do, that all interests are, or at least ought to be, insured—a statement which is manifestly valueless as a premise to Mr. Owen's conclusion unless it is wholly true, but one which is equally clearly only partially true. Mr. Owen further maintains that general average is not only useless but expensive, and asserts, probably quite accurately, that out of £100 paid by an insurance company in claims, £8 10*s.* is paid in respect of general average, and that out of this £8 10*s.* the adjuster's fees amount to ten shillings, while another ten shillings is spent in surveys and other expenses attending adjustment. What one would like to know is how much of the ten shillings spent in surveys would be saved if general average were abolished, and whether underwriters would not find their office and arbitration expenses increased by more than ten shillings if average adjusters, who are in fact semi-official arbitrators and accountants, were not called in.

However this may be, general average still exists, and is likely to exist for many centuries to come, and as long as it exists it is admitted on all hands as desirable that the law relating to it should be codified. That such a task presents great difficulty is also admitted, but there does not appear to be any insuperable obstacle to its achievement. If the attempts hitherto made have not been altogether successful, their failure may perhaps be attributed to the principle upon which they have been undertaken, namely, the classification of facts rather than the codification of

law; a classification of facts is, necessarily, on the one hand lengthy, and on the other hand incomplete. In order to avoid these dangers the scope of the following code has been carefully confined to the determination of the principles which underlie the decisions of the English Courts of Justice, all questions of fact being remitted to the province of appropriate tribunals. The temptation throughout has been to multiply references, and in disputed cases to compare the law of other countries and the practice of average adjusters with what is conceived to be the law of England; a necessarily limited space has, however, made it impossible to refer even to the works of eminent British adjusters, much less to the provisions of foreign law.

It should perhaps be added that the Insurance Bill now before the House of Lords does not deal with the subject of general average, except in its relation to insurance.

Suggested Code of English Law relating to General Average.

1. General average is loss incidental to a maritime adventure, which two or more parties to the adventure are by law compellable to bear proportionally to their interests in the adventure; provided that salvage is not general average.

2. General average is in every case occasioned by an act or series of acts called a general average act.

No act is a general average act unless it has each and all of the characteristics enumerated in sections 5 to 10.

The amount of a general average is determined at the place specified in section 11 and according to the rules laid down in sections 12 to 17.

General average is contributed to by the persons specified in section 18 proportionally to the amounts of their interests as ascertained by sections 19 to 24.

The right to claim and to resist contribution is limited by certain rules specified in sections 25 to 27; is subject to contract and custom to the extent specified in sections 28 and 29; and may be enforced by the means specified in sections 30 to 32.

Note to section 1. This section is an explanation of the term general average, rather than a definition of its nature. It excludes, however, the use of the word average as the equivalent of contribution, which use has not only caused much confusion, but is moreover improper, because it is inapplicable to the expression 'particular average.' 'Average,' or loss at sea, is called general

when it will ultimately fall on certain persons generally; it is called particular when it will fall on one person particularly.

The whole of this code is an attempt to determine in what cases and in what way average is general.

Lowndes treats salvage as a typical general average expenditure, and no doubt sums paid in settlement of a salvage claim are often adjusted as general average. For the purposes of a code, however, it would seem preferable to observe the distinction between incurring salvage liability and hiring services when in distress so as to create a general average; a distinction which is clearly brought out by the judgments in the Court of Appeal in *Ocean Steamship Co.* v. *Anderson*[1]. Salvage services are paid for only if successful, hired services must be paid for according to the terms of the contract by which they are hired; remuneration for salvage services is recovered by an action *in rem* against the property salved, remuneration for hired services is recovered by a personal action against the person who hires them. It is with the latter of these alone that this code is concerned. The inconvenience of including salvage in general average arises from two causes; first, there is included in salvage much which is not general average, and secondly the values which contribute to salvage should theoretically frequently be, and practically sometimes are, different from those which contribute to general average.

Note to section 2. An act necessarily involves a determination of will producing an effect in the sensible world[2]. By making general average dependent upon an act there is at once introduced that circumstance which has always been insisted upon as essential to general average, the fact that the loss must have been voluntarily incurred—*Price* v. *A.* 1. *Ships' Ins. Association*[3]; *Ocean S.S. Co.* v. *Anderson*[4]; *Kemp* v. *Halliday*[5].

The English Courts have never adopted the view of Benecke that an act is not voluntary unless an alternative act is practically possible.

A General Average Act.

3. When a series of acts constitutes a single process, such a series is for all the purposes of this code deemed to be one act.

4. A general average act is an act which has all the six characteristics specified in sections 5 to 10.

5. It is an act performed in the course of a maritime adventure.

6. It is an act whereby money or money's worth is parted with.

7. It is an act of an extraordinary nature. For the purposes of this code an extraordinary act occurs only when—

(*a*) Services or materials are procured by a person who is under no contractual liability to supply such services or materials; or,

[1] 13 Q. B. D. 651.
[2] Holland's Jurisprudence, sixth edition, p. 93.
[3] Fry L.J., 22 Q. B. D. at p. 590.
[4] Bowen L.J., 13 Q. B. D. at p. 666.
[5] Blackburn J., 6 B. & S. at p. 746.

(*b*) Property is used for a purpose for which no part of it was originally intended to be used.

8. It is an act done with a view to preserve from destruction two or more of the following interests:—

(*a*) The interest of each cargo owner in the preservation of his cargo from injury or destruction.

(*b*) The interest of the shipowner in preserving his ship and its equipment from injury or destruction.

(*c*) The interest of the shipowner or other person who will receive the freight to be earned on the voyage in the earning of such freight.

(*d*) The interest of a person who has paid advance freight in the safe arrival of the goods on which he has paid freight, provided that such freight is not recoverable.

Sub-section. An act which does in fact benefit two or more of the interests specified in this section is presumed to have been done with a view to benefit each of such interests. Such presumption may, however, be rebutted by showing:—

(*a*) The desperate condition of such interests collectively; or,

(*b*) The insignificance of the general benefit as compared with the benefit derived by one particular interest.

9. It is an act done in time of peril to preserve from a common imminent danger each of the interests for whose benefit it is done. No act done after any one of such interests is in safety is, as regards that interest, a general average act.

10. It is an act which is necessary and necessitated by the failure of ordinary acts.

Sub-section. An unnecessary act is deemed to be necessary in so far as it renders a necessary act unnecessary.

Note to section 3. The consideration of what acts or series of acts constitute a single process is of great importance, for in this code there are included as general average expenses only those expenses which are incurred in the performance of a general average process: no other expense is deemed to be due to a general average expense. The reasons for this are fully dealt with in the note to section 13; but it may be well to remark at once that the cost of repairing damage done by a general average act stands on a different footing; such cost is the measure of the damage done by the act occasioning it: it is very rarely in itself a general average expense.

Whether or no any particular series of acts constitutes a single process is a question of fact depending on all the circumstances of each case. Thus in *Svendsen* v. *Wallace*[1], where a ship sought a port of refuge in such circumstances that a general average was occasioned, and the question was as to which of the expenses

[1] 10 App. Cas. 404.

incurred were properly chargeable to general average, Lord Justice Bowen, in the Court of Appeal[1], held that the question was one of fact, and in this opinion he was supported by Lord Blackburn in the House of Lords[2].

The following series of acts have been held to constitute a single process.

In *Svendsen* v. *Wallace*[2], where a ship requiring repairs sought a port of refuge and the cargo was discharged in order to effect such repairs, it was held that going into the port and there discharging the cargo was a single process, known as 'going in to repair'; the repairing of the ship, the warehousing and reshipment of the cargo, and the leaving of the port were, however, held not to constitute part of that process, the dicta of Chief Justice Cockburn and Lord Justice Thesiger in *Atwood* v. *Sellar*[3] being thus overruled.

According to Lord Justice Bowen in *Svendsen* v. *Wallace*[4], it would seem that where a ship seeks a port of refuge merely for shelter, the entering, staying at, and leaving the port are a single process.

In *Moran* v. *Jones*[5], where a ship containing a cargo belonging to the shipowner struck on a bank near Liverpool and was much strained and twisted, the decks rising about two feet, it was held that sending the materials of the ship and the cargo in lighters to Liverpool, scuttling the ship, jettisoning 300 tons of ballast, pumping and floating the ship, towing her to Liverpool and there discharging the remaining ballast, all constituted one process, that is to say, 'getting the ship off the bank and sending her to be repaired.' Lord Esher in *Svendsen* v. *Wallace*[6] said that he considered this case to be overruled, but inasmuch as it is a decision on the facts, it can hardly be said to be actually overruled, particularly as it has been favourably or at least neutrally commented on in the Exchequer Chamber in *Walthew* v. *Mavrojani*[7], as well as by Lord Justice Bowen in *Svendsen* v. *Wallace*[8], and by Mr. Justice Wills in *Royal Mail Co.* v. *Bank of Rio*[9].

In *Job* v. *Langton*[10], where a ship was stranded on the coast of Ireland, so as to be high and dry at low water and the cargo was discharged and sent to Dublin, it was held that the subsequent floating of the ship with the aid of a steam tug and by cutting a channel was in itself a complete process, and independent of the lightening of the ship.

The facts of the decision in *Walthew* v. *Mavrojani*[7] were very similar to those in *Job* v. *Langton*.

Note to section 4. No act is a general average act which fails in any of the six characteristics given in the code; on the other hand these six characteristics are alone essential. Thus it is immaterial whether the act be successful or not, or whether it be done by the

[1] 13 Q. B. D. at p. 85.
[2] 10 App. Cas. at p. 414.
[3] 4 Q. B. D. at p. 360; 5 Q. B. D. at p. 290.
[4] 13 Q. B. D. at p. 90.
[5] 7 E. & B. 523.
[6] 13 Q. B. D. at p. 80.
[7] L. R. 5 Ex. at p. 122.
[8] 13 Q. B. D. at p. 93.
[9] 19 Q. B. D. at p. 371.
[10] 6 E. & B. 779.

master of the ship, or by any other person—*Price* v. *Noble*[1]; *Mouse's case*[2].

Note to section 5. Where there is a charter-party, the adventure begins with the taking effect of the charter-party—*Williams* v. *London Assurance*[3]; otherwise it begins with the first loading of cargo—*The Carron Park*[4]; it does not end until all the cargo is discharged—*Whitecross Wire Co.* v. *Savill*[5].

Note to section 6. It is clear that there is no sacrifice unless money or money's worth is parted with. One cannot recover contribution to a loss which has not actually been sustained.

Note to section 7. It has never been disputed that a sacrifice or expense is not general average unless it is extraordinary. It is however no easy matter to decide in what sense the word extraordinary is to be interpreted. A sacrifice or expense may be extraordinary in its nature, or in its amount, or in its occasion, or in its motive, or in its results. Each of these interpretations has in turn been contended for as the basis of general average: several have been adopted by foreign laws, several have been adopted by the York Antwerp Rules, but the English Courts have persistently rejected all except that which is adopted in this code. Thus it has been held that an act is not extraordinary merely because the amount of loss resulting from it is extraordinary—*Harrison* v. *Bank of Australasia*[6]; *Wilson* v. *Bank of Victoria*[7]; nor because the occasion on which it is done is extraordinary—*Taylor* v. *Curtis*[8]; nor because the motive with which it is done is extraordinary—*Covington* v. *Roberts*[9]; *Power* v. *Whitmore*[10]; nor because the results which follow from it are extraordinary—*Hills* v. *London Assurance*[11]; but only because it is extraordinary in its nature, and for no other reason—*Birkley* v. *Presgrave*[12]. The conclusion therefore is that the extraordinary element which is essential to general average, is to be found alone in the extraordinary nature of the act which occasions it[13]. This conception is expanded in the subsections.

(*a*) The effect of the decisions appears to be, that the criterion between ordinary and extraordinary expenses is the contractual obligation which is incidental to the former alone; thus in all those cases where it is said that expenses incurred by the shipowner in the fulfilment of his ordinary duty are not general average, it will be observed that it is the contractual duty of the shipowner that is referred to—*Kemp* v. *Halliday*[14]; *Atwood* v. *Sellar*[15]; *Svendsen* v. *Wallace*[16]; *Schuster* v. *Fletcher*[17]. The duty of the shipowner as bailee of the cargo and *negotiorum gestor* is not, in the absence of actual agreement, contractual.

[1] 4 Taunt. 123, 13 R. R. 566. [2] 12 Co. Rep. 63. [3] 1 M. & S. 318, 14 R. R. 441.
[4] 15 P. D. 203. [5] 8 Q. B. D. 653. [6] L. R. 7 Ex. 39. [7] L. R. 2 Q. B. 203.
[8] 6 Taunt. 608, 16 R. R. 686. [9] 2 B. & P. (N. R.) 378, 9 R. R. 669.
[10] 4 M. & S. 141, 16 R. R. 416. [11] 5 M. & W. 569. [12] 1 Esat 220, 6 R. R. 256.
[13] See postscript hereto, p. 47. [14] L. R. 1 Q. B. 520.
[15] 4 Q. B. D. 342, 5 Q. B. D. 286. [16] 13 Q. B. D. 69, 10 App. Cas. 404.
[17] 3 Q. B. D. 418.

(*b*) The result of the cases seems equally clear that the criterion of extraordinary sacrifice lies in the way in which the sacrificed property is used. If it is used for the purpose for which it was intended, then, although the motive with which it is so used is extraordinary, the sacrifice is not general average; if, on the other hand, property is damaged by being used for a purpose for which it was not intended, the sacrifice is then extraordinary—*Harrison* v. *Bank of Australasia*[1]; *Wilson* v. *Bank of Victoria*[2]; *Birkley* v. *Presgrave*[3].

Note to section 8. It has so often been said that a general average act must be done for the benefit of 'the whole adventure,' 'ship, freight, and cargo,' 'the whole concern,' and the like, that it is necessary to account for the view which is here taken as to the fundamental nature of general average. The fact is, that in almost all the cases which have come before the Courts, the cargo as well as the ship and freight has actually been in peril. This is no doubt due to several causes. In the first place, when ship and freight are in peril it generally happens that the cargo is in peril also; secondly, the interests of ship and freight are often combined in the same person; and lastly, it appears from the report of *Hall* v. *Janson*[4], that there was during a long time a custom at Lloyd's for underwriters on freight not to contribute to general average. For these reasons then there is not any great body of authority for the proposition that there may arise a general average as between any smaller number of interests than all those involved in the adventure. The decision however in *Hall* v. *Janson*[4] is decisive in favour of such a proposition, which is moreover in accordance with the dicta of Chief Justice Campbell in *Moran* v. *Jones*[5], and of Lord Justice Bowen in *Svendsen* v. *Wallace*[6]. The expressions 'ship, freight, and cargo,' 'the whole adventure,' and so forth, are to be interpreted with reference to the facts of the cases in which they are used. See however the *Brigella*[7].

It is hardly necessary to quote authorities to show that the interests enumerated in the section are the only interests which are the subject of general average. The way in which the values of such interests are ascertained is described in sections 21 to 24.

It has often been attempted to bring the interest of the cargo owner in the arrival, as distinct from the safety, of his cargo within the scope of general average, but such attempts have always failed in the English Courts—*Walthew* v. *Mavrojani*[8]; *Hallet* v. *Wigram*[9].

The interest of a shipowner in a peculiarly lucrative charter-party might well be made the subject of general average, though only to such extent as the value of the charter-party exceeded the market value of the freight at the time; but it would be difficult to make a charterer pay contribution for release from an onerous charter,

[1] L. R. 7 Ex. 39.
[2] L. R. 2 Q. B. 203.
[3] 1 East 220, 6 R. R. 256.
[4] 4 E. & B. 500.
[5] 7 E. & B. at p. 532.
[6] 13 Q. B. D. at p. 92.
[7] '93, P. 189.
[8] L. R. 5 Ex. 116.
[9] 9 C. B. 580.

and on the whole it seems best to exclude all interests not involved in the particular voyage; though where a vessel is chartered for a round voyage, homeward as well as outward freight is included in the voyage—*Williams* v. *London Assurance* [1].

Note to subsection (*a*). The authority for this is to be found in the decision, and more particularly in the judgment, of Lord Esher in the *Walter Raleigh*, an unreported case decided in the Court of Appeal in 1892. It is an expression of the *sauve qui peut* doctrine.

(*b*). Where specie was saved from a stranded ship it was held that this was not done with a view to lighten the ship—*Royal Mail Co.* v. *Bank of Rio* [2]; Lush J. in *Dent* v. *Smith* [3].

Note to section 9. From *Job* v. *Langton* [4], decided in 1856, to *Svendsen* v. *Wallace* [5], decided in 1885, there is abundant and consistent authority for the proposition, that a general average act cannot be done in respect of an interest which is in safety. To this rule however there are two important limitations, namely, those which are expressed in sections 3 and 15, and dwelt upon in the notes to those sections. The first of these is to the effect that a general average process instituted for the benefit of several interests may be incomplete, and continue to give rise to general average after one of those interests is in safety; the second lies in the necessity of distinguishing the execution of repairs rendered necessary by a general average act, which is the measure of a general average sacrifice, from that which is itself a general average act. It is to the failure to make this distinction that the dissenting judgment of Mr. Justice Manisty in *Atwood* v. *Sellar* [6] is due.

A 'common danger' being essential to general average, the nature of that danger remains to be considered. Now though general average is an incident peculiar to a maritime adventure, the danger which is the occasion of the general average is not necessarily a sea peril. Thus for instance, according to Mr. Justice Montague Smith in *Walthew* v. *Mavrojani* [7], and Chief Justice Campbell in *Job* v. *Langton* [8], general average may arise from steps taken in order to preserve a perishable cargo safely landed on an island from destruction by decay. The danger must however be imminent though the property in danger may momentarily be safe, for as Chief Baron Kelly said in *Harrison* v. *Bank of Australasia* [9], 'A certainty of destruction within a short time unless prevented is an emergency and imminent.'

Note to section 10. An unreasonable act is clearly unnecessary—*Price* v. *Noble* [10]; but besides this it is the duty of the shipmaster to accomplish the voyage so far as is possible by ordinary means: it is only where such means fail or are inadequate that an extraordinary act becomes necessary—*Wilson* v. *Bank of Victoria* [11]; *Harrison* v. *Bank of Australasia* [12].

[1] 1 M. & S. 318, 14 R. R. 441. [2] 19 Q. B. D. 362. [3] L. R. 4 Q. B. at p. 450.
[4] 6 E. & B. 779. [5] 10 App. Cas. 404. [6] 4 Q. B. D. at p. 350.
[7] L. R. 5 Ex. 125. [8] 6 E. & B. at p. 792. [9] L. R. 7 Ex. at p. 52.
[10] 4 Taunt. 123, 13 R. R. 566. [11] L. R. 2 Q. B. 203. [12] L. R. 7 Ex. 39.

The authority for the subsection is to be found in *Lee* v. *Southern Insurance Co.*[1], an insurance case which would seem however to cover an analogous case in general average. The practice under York Antwerp Rules with regard to substituted expenses seems to go beyond what is justified by the decisions of the Courts, for as Mr. Justice Blackburn said in *Wilson* v. *Bank of Victoria*[2], 'Expenses actually incurred must be apportioned according to facts that actually happened.'

The Place of Adjustment.

11. The place at which claims arising from a general average act are required to be adjusted is called the place of adjustment.

The place of adjustment is the original destination of the ship unless both the following conditions are satisfied, namely, first that the voyage as a commercial undertaking is in fact terminated at the departing or some intermediate port; and secondly, either that the voyage is so terminated of necessity, or that the parties to the adventure consent to the adjustment being made at that place, in which case the place of adjustment is the place at which the voyage so terminates.

Note to section 11. It has never been disputed that in the absence of special conditions the original destination of the ship is the place of adjustment—*Simonds* v. *White*[3]. When a ship is chartered for a round voyage it would seem that the destination of the ship is the place of departure—*Williams* v. *London Assurance*[4].

The question at what point a voyage actually terminates is one of fact. In *Hill* v. *Wilson*[5], Mr. Justice Lindley decided that a ship sailing for Hull with some 2,000 tons of merchandise in fact terminated the voyage at Copenhagen, the ship having been compelled to put into that port, and having there disposed of all the cargo except 120 tons, with which, when repaired, she proceeded to Hull.

A voyage is terminated of necessity not only when it becomes physically impossible to continue it, but also when it becomes practically impossible to do so. 'A thing is practically impossible when it can only be done at an excessive or an unreasonable cost[6].' 'It is the master's duty to repair the ship and proceed with the voyage if it can be done within a reasonable time and at a reasonable cost[7],' but where this is impossible the voyage terminates of necessity—*Mavro* v. *Ocean Marine*[8].

It is to be remarked that one may consent to a voyage being terminated at an intermediate port without necessarily consenting to adjustment at that port—*Hill* v. *Wilson*[9].

[1] L. R. 5 C. P. 397. [2] L. R. 2 Q. B. at p. 212. [3] 2 B. & C. 805.
[4] 1 M. & S. 318, 14 R. R. 441. [5] 4 C. P. D. 329. [6] *Moss* v. *Smith*, 9 C. B. 103.
[7] Cockburn C.J., 10 C. P. at p. 416. [8] 10 C. P. 414.
[9] 4 C. P. D. 329.

Estimation of the Amount of General Average.

12. The amount of a general average is to be determined according to sections 13 to 17.

13. All expense which is, and so far as it is, reasonably incurred in the course of doing a general average act is general average, provided that expense which would inevitably have been incurred even if the general average act had not been done is not general average.

14. Ordinary expense saved by the doing of a general average act is to be deducted from general average.

15. The cost including all incidental expenses of repairing or arresting damage, which within the meaning of section 16 is due to a general average act, is general average.

16. All injury to material substance directly or indirectly caused by a general average act is damage due to the general average act, provided that

(*a*) Damage or deterioration which will inevitably happen to property, whether any general average act be done or no, is deemed not to be due to the general average act.

(*b*) Damage or deterioration which could not reasonably be anticipated as following from the general average act, is deemed not to be due to the general average act.

17. The actual value at the place of adjustment, or destination if previously reached, of each of the interests in the adventure, that is to say of ship, stores, freight, and each shipment of cargo, is to be determined according to sections 21 to 24. The value which each of such interests would have had at that place if ship and cargo had arrived there at the time of actual arrival but without damage, loss, or repairs due to a general average act is also to be estimated.

In each case in which the estimated value exceeds the actual value the difference is general average.

In each case in which the actual value exceeds the estimated value, the difference is to be deducted from general average.

Note to section 13. In this code the view robustly stated by the Master of the Rolls in *Svendsen* v. *Wallace*[1] has been adopted, namely, that 'The loss which arises in consequence of an expense is the expense itself.' Whence it follows that only those expenses which are incurred in the actual performance of a general average act are, as such, general average. Lord Justice Bowen, it is true, expressed an opinion that an expenditure may be general average though not itself a general average sacrifice if it is an expenditure

[1] 13 Q. B. D. at p. 73.

caused or rendered necessary by one [1]; but it is believed that the substance of the Lord Justice's opinion is secured by section 3 of this code, according to which any series of acts which constitutes a single process is to be treated as a single act. For if it were possible that any expenses other than those incurred in a single general average process could be, within the meaning of the Lord Justice, caused or rendered necessary by a general average act, then surely among those expenses would be reckoned that of leaving a port, the entering of which has been a general average act. But inasmuch as Lord Justice Bowen decided [2] that such an expense was not general average, it follows that he restricted the meaning of his opinion by his decision, which decision in fact comes to this, that an expenditure may be general average, though not itself a general average sacrifice, if it is incurred in the course of a general average process. It may be that the Lord Justice used the expression 'Expenditure caused or rendered necessary by general average sacrifice [3],' meaning to include therein the cost of repairs occasioned by a general average sacrifice; but it seems better to consider the cost of repairs due to a general average act as the measure of the damage done by the act, rather than as an expense caused by the act, for in the latter view remote causes have to be considered. Thus in the case of a ship seeking a port of refuge in order to repair damage, the cost of leaving the port would not be 'caused or rendered necessary' by entering the port if the damage were particular average, whereas it would if the damage were general average. Mr. Justice Manisty felt the gravity of this difficulty and expressed it in his judgment in *Atwood* v. *Sellar* [4].

The House of Lords decided in *Anderson* v. *Ocean S.S. Co.* [5] that any party has a right to submit to a jury the questions not only whether it has been reasonable that money should be expended for a general average purpose, but also whether the amount of such expenditure has been reasonable.

The proviso as to expenses which inevitably would have been incurred is based on analogy to the case of *Shepherd* v. *Kottgen* [6]. Mr. Justice Manisty moreover, in *Atwood* v. *Sellar* [4], pointed out that if a ship while in course of bearing up for a port of refuge sustains general average damage, the contribution to the expense of entering and quitting the port of refuge cannot be affected by the happening of such damage.

Note to section 14. Thus in *Plummer* v. *Wildman* [7], where, whatever Lord Ellenborough may say to the contrary, it was in fact decided, though in the light of subsequent decisions wrongly decided, that in the circumstances of that case repairing a ship in order to remove the incapacity for prosecuting the voyage was a general average act occasioning general average expense, Lord Ellenborough expressed his opinion that 'if any benefit *ultra* the

[1] 13 Q. B. D. at p. 85. [2] In *Svendsen* v. *Wallace*. [3] 13 Q. B. D. at p. 85.
[4] 4 Q. B. D. at pp. 351, 352. [5] 10 App. Cas. 107.
[6] 2 C. P. D. 585. [7] 3 M. & S. 482, 16 R. R. 334.

mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average.'

Note to section 15. The judgments in *Atwood* v. *Sellar*[1], both in the Queen's Bench Division and also in the Court of Appeal, have been subjected to much judicial criticism; but the decision not only stands undisputed, but has met with approval in the House of Lords[2]. *Atwood* v. *Sellar*[1] decides that where a ship damaged by a general average act enters a port of refuge to repair such damage, then not only the cost of such repairs, but also the expenses incurred in entering and leaving the port, as well as the expense of unshipping, warehousing, and reshipping the cargo are general average. Lord Justice Thesiger, moreover, expressed his opinion that the wages and provisioning of master and crew during the repairs are also general average[3], and quoted with approval from Abbott on Shipping that 'If the damage to be repaired be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution; the accessory should follow the nature of its principal.' Thus the cost of raising funds to pay for such repairs should also be included in general average.

The expense of arresting and repairing damage done to cargo by a general average act falls under the same head; for instance, the expense of unloading, drying, and reloading goods damaged by water used to extinguish fire.

Note to section 16. Repairs are expressly limited to repairs of damage done to material substance in order to make it clear that expenses otherwise occasioned cannot be admitted as general average by being treated as the cost of repairs.

(*a*) *Shepherd* v. *Kottgen*[4] decides that there is no sacrifice of, and therefore no contribution to the loss of property which is already doomed to destruction. Whether any particular property is or is not doomed to destruction is a question of fact to be decided by the circumstances of each case. Thus Mr. Justice Willes, in *Johnson* v. *Chapman*[5], said, 'A lawyer could not lay down as a matter of pure law that all cumber cut away is wreck.'

Property which may be saved by the doing of a general average act is not doomed to destruction.

By extending the principle of *Shepherd* v. *Kottgen*[4] from the case of complete destruction to that of partial damage, the difficult and hitherto undecided problem occasioned by voluntary stranding finds its solution. Voluntary stranding gives rise to general average with the proviso that damage done by the voluntary stranding is not

[1] 4 Q. B. D. 342; 5 Q. B. D. 286. [2] 10 App. Cas. at p. 420.
[3] 5 Q. B. D. at p. 291. [4] 2 C. P. D. 585. [5] 19 C. B. N. S. at p. 582.

general average, so far as it can be proved by the person resisting contribution that the injury resulting from the voluntary stranding would inevitably have happened to the property damaged whether the ship had been voluntarily stranded or no.

(*b*) Thus damage done to a ship by collision with jettisoned goods or wreck cut away is not general average. The rule is of course part of the general law as to the measure of damages—*Hadley* v. *Baxendale*[1].

Note to section 17. Thus Chief Justice Bovill in *Fletcher* v. *Alexander*[2] says, 'The rules as to contribution and adjustment seem to me to depend on the probable state of things at, and to have reference to the time and place where adjustment ought to take place.'

In estimating the value which cargo would have had at the place of adjustment or at its destination, if it is to be delivered at an intermediate port, the condition of similar cargo which has been undamaged by the general average act is very material evidence.

Complete empirical regulations are to be found in the York Antwerp Rule XIII, for estimating the value which a ship would have had if she had not been damaged and repaired.

Persons liable to contribute to General Average.

18. Each person having at the time of the happening of a general average act an interest in the adventure as defined by section 8, must contribute to the general average arising from an act done for the benefit of such interest.

Note to section 18. A person other than the owner at the time of the loss may become liable to contribute to general average by contract—*Scaife* v. *Tobin*[3]. All the questions of difficulty arising under this section are dealt with in the note to section 8.

Method and Amount of Contribution.

19. Each of the persons specified in section 18 must contribute in respect of each of those interests specified in section 8, for the benefit of which the general average act has been done, a sum which bears to the general average the same proportion which the value of such his interest bears to the aggregate value of all such interests.

The payment of such contribution must be made to the person on whom the general average loss immediately falls.

20. The value of an interest in an adventure is estimated as its value at the termination of the voyage, together with the amount to be made good in general average, less expenses

[1] 9 Ex. 341. [2] L. R. 3 C. P. at p. 383. [3] 3 B. & Ad. 523.

other than general average incurred in respect of that interest subsequent to the happening of the general average act.

21. The value of the ship at the termination of the voyage is the sum for which the owner if reasonable would be willing to sell it, together with its equipment, stores, and unused provisions at the time and place of the termination of the voyage irrespective of its engagements.

22. The value of the cargo at the termination of the voyage is its market value at the time and place of delivery from the ship.

23. The value at the termination of the voyage of advance freight is the amount of advance freight paid in respect of goods which have in consideration of the payment of such advance freight been delivered at their destination.

24. The value at the termination of the voyage of freight other than advance freight is the gross amount of such freight payable by the shippers of goods in respect of the carriage of goods carried on the voyage.

Note to section 20. See *Fletcher* v. *Alexander*[1].

Note to section 21. See *African S.S. Co.* v. *Swanzy*[2]; *Grainger* v. *Martin*[3].

Note to section 22. See *Fletcher* v. *Alexander*[1].

Note to section 23. See *Trayes* v. *Worms*[4].

Limitations on the right to claim and on the liability to pay Contribution to General Average.

25. Where a general average act has become necessary owing to the negligence of any party, or owing to the negligence of those for whom he is responsible, that party is not entitled to claim contribution, but is primarily liable to make good the loss.

Subsection. Cargo stowed on deck is for the purposes of this section deemed to be negligently stowed unless such stowage is customary in the particular trade, or unless all parties to the adventure agree to its being so stowed.

26. There is no right to claim nor liability to pay general average in respect of the lives or limbs of freemen, nor in respect of cargo other than that put on board for the purpose of commerce.

27. Where expense has been incurred in order to accomplish some end by means of a general average act, no party can be called upon to contribute in respect of his interest a greater sum

[1] L. R. 3 C. P. 375.
[2] 2 K. & J. 660.
[3] 4 B. & S. 9.
[4] 19 C. B. N. S. 159.

than that for which the end in question might have been accomplished so far as his interest was concerned.

Note to section 25. This is quite clear. See *Robinson* v. *Price*[1]; *Johnson* v. *Chapman*[2]. A party is not precluded from claiming contribution by the negligence of his servants if he is not responsible for their negligence—*The Carron Park*[3].

General average remains general average in spite of the primary liability of the negligent party to make good the loss—*Strang* v. *Scott*[4].

Note to sub-section. See *Johnson* v. *Chapman*[2]; *Wright* v. *Marwood*[5]; *Strang* v. *Scott*[4].

Note to section 26. See *Brown* v. *Stapylton*[6].

Note to section 27. See the judgment of Mr. Justice Blackburn in *Kemp* v. *Halliday*[7].

The effect of Contract and Custom in regard to General Average.

28. The provisions of this code are subject to the effect of expressed contract.

29. There is a presumption that the customs of British average adjusters are in conformity with this code.

Note to section 28. Although there are many obiter dicta to the contrary, it is abundantly clear that the opinion expressed by Lord Esher in *Burton* v. *English*[8] is right, and that the obligation to pay general average is quasi-contractual and not contractual—*Burton* v. *English*[8], *Crooks* v. *Allan*[9], *Schmidt* v. *Royal Mail Co.*[10]; this obligation cannot therefore be governed by the implied intentions of the parties. It is however clearly competent to the parties to enter upon any express contract in relation to general average—*Stewart* v. *West India Pacific*[11].

Note to section 29. According to Lord Blackburn as he expressed himself in *Svendsen* v. *Wallace*[12], and according to the whole current of English authorities, it is clear that the custom of adjusters has no greater force than to raise a presumption in favour of the legality of the usage.

Means of enforcing Payment of Contribution to General Average.

30. Every person entitled to contribution to general average may enforce payment thereof by a direct action brought against each person liable to contribute thereto.

[1] 2 Q. B. D. 91, 295.
[2] 19 C. B. N. S. 563.
[3] 15 P. D. 203.
[4] 14 App. Cas. 601.
[5] 7 Q. B. D. 62.
[6] 4 Bing. 119.
[7] L. R. 1 Q. B. 520.
[8] 12 Q. B. D. 218.
[9] 5 Q. B. D. 38.
[10] 45 L. J. Q. B. 646.
[11] L. R. 8 Q. B. 88, 362.
[12] 10 App. Cas. at p. 416.

31. The shipowner has moreover a lien on all cargo whose owner is liable to contribute to general average, and can require before he parts with it reasonable security for the payment of contribution.

32. Every person entitled to contribution may bring an action against the shipmaster if he should fail to exercise his lien on the cargo, or take other necessary steps for the adjustment of average and the security of its payment.

Note to section 30. See *Dobson* v. *Wilson* [1].

Note to section 31. See *Crooks* v. *Allan* [2]. The cargo owner is bound to offer reasonable security, and the master cannot require unreasonable security before parting with the cargo—*Huth* v. *Lamport* [3], *Strang* v. *Scott* [4].

Note to section 32. See *Crooks* v. *Allan* [2], and *Strang* v. *Scott* [4]. It does not however follow that an injunction can be claimed to restrain a shipmaster from parting with cargo which is liable to contribute to general average—*Hallett* v. *Bousfield* [5].

In the absence of special contract general average is adjusted according to the law of the place of adjustment—*Simonds* v. *White* [6], *Lloyd* v. *Guilbert* [7]. Hence it follows that this code is intended to apply only to those cases in which the law of the place of adjustment is English law.

H. C. Dowdall.

P.S.—The effect of section 7 is supported by the judgment of Sir Francis Jeune in the *Bona*, reported in the Times for November 14, 1894. In that case a ship grounded, and the engines were driven ahead and astern in order to get her off. It might conceivably have been held that the engines, though used with an extraordinary motive, were used for the purpose for which they were intended, namely, as the propelling power of the ship, and if this view had been taken judgment would no doubt have been given for the defendants; but it was in fact held that the engines were used for a purpose for which they were not intended, so that the damage done to them by such use was general average. The expenditure of coal in driving the engines was also held to be general average, as forming part of the general average act of abusing the engines. Such expenditure might also have been held to be general average, because the contractual liability of the shipowner under the contract of affreightment was put an end to by the stranding of the vessel, and the coals were supplied by him under his mixed liability as bailee of the goods and *negotiorum gestor*.

H. C. D.

[1] 3 Camp. 480, 14 R. R. 817.
[2] 5 Q. B. D. 38.
[3] 16 Q. B. D. 442, 735.
[4] 14 App. Cas. 601.
[5] 18 Ves. 187, 11 R. R. 184.
[6] 2 B. & C. 805.
[7] L. R. 1 Q. B. 115.

A SPANISH VIEW OF BENTHAM'S SPANISH INFLUENCE.

IN April last, Don Luis Silvela, who has been prominent for many years as a Professor of Criminal Law in the University of Madrid, was received as a member of the Spanish Royal Academy of Moral and Political Sciences. He succeeded Don Alonzo Martinez, a man of letters, a jurist, and a statesman, who has left his mark on the Spanish Constitution of 1876, and on that portion of the Spanish Civil Code which deals with the law of Marriage. The official discourse which Señor Silvela delivered on the occasion of his public reception as an Academician has since been printed in a quarto pamphlet of some ninety pages. It is full of special interest for English jurists, even independently of its graceful literary skill and its facile grasp of jural philosophy. For it is an attempt to portray and criticize, partly by the help of documents hitherto unpublished, the influence exercised by our countryman Bentham upon lawyers and politicians in Spain, during the two periods in his lifetime when a temporary revival of Parliamentary institutions gave Spain a brief space of legislative activity and intellectual freedom.

The first of these Parliamentary periods belongs to the four years' struggle (1808–12) against the kingship of Joseph Bonaparte. It produced the famous Constitution, drafted in 1811 at Cadiz whilst French shells were exploding under the draftsmen's window, and adopted in March 1812; which is the starting-point of modern Spanish politics, and was at once accepted in all the countries of Southern Europe as the ideal of their Liberalism. But this first period ended in May 1814, when Ferdinand overthrew that Constitution, restoring unlimited monarchy, and along with it the monasteries, the Inquisition, and the exemptions of the clergy and nobility from taxation. To get rid of the Liberal officers in the army, commands were ultimately assigned to them in a force destined for South America to subjugate the colonies that had renounced allegiance to the monarch. But in this very force, when assembled at Cadiz for embarkation to Buenos Ayres, General Riego, in January 1820, successfully raised the standard of insurrection. So strong did the insurgents show themselves throughout Spain, that within two months the king restored the Constitution,

and the second Parliamentary epoch began. This revolution kindled a similar fire in Portugal, Sardinia, and Naples, each of which proceeded to proclaim a Constitution copied from the Spanish one. Even in Spain itself, however, the nation was so far from unanimity that civil war seemed imminent; and in October, 1822, the Holy Alliance, from its Congress at Verona, called upon the Cortes to alter the Constitution by enlarging the powers of the king. On their refusal, the French army marched across the Pyrenees and chased the Cortes to Cadiz. There it abdicated its powers in August, 1823; and the second period of Spanish Parliamentary history was brought to an end.

These years, 1820–23, are in the life of Jeremy Bentham what 1808–13 are in English military annals—the great Peninsular period. His writings obtained for some time a greater celebrity in Spain and Portugal than anywhere else in Europe, rivalling indeed the celebrity which at a much later date they won in England itself.

For though Bentham was a native of London, his fame only reached England after a somewhat circuitous journey over the Continent. Paradoxical as this may seem, it is sufficiently evidenced by the fact that the works which chiefly won him his fame are those which first appeared, not in English but in French, and not from his own pen but from that of Etienne Dumont. A collected edition of these was published in 1829, at Brussels, and a still more complete one appeared there in 1840; but in England no complete edition was printed until 1843, ten years after Bentham's death. And the paradox can readily be explained. Jeremy Bentham was not a truly English jurist. His writings, and still more his opinions, were always somewhat repellant to typical Englishmen; he was at heart a disciple of the French Encyclopaedists of the eighteenth century. It was only when the nations of the Continent had done homage to the fertility and originality of his intellect that he came to command any general attention in England.

Bentham was born in London in 1748, and his home was principally there until his death in the year 1832. But though educated thus far away from the scene where the philosophers of France were busy in developing the ideas which culminated in the dramatic changes of the Revolution, and though trained for the quiet career of an English lawyer, he soon fell under the influence of the Encyclopaedist philosophy. Hardly had he begun to exercise his profession, when he abruptly flung it aside; disgusted by the subtleties, technicalities, and fictions of the English law of his time. In the fulness of his contempt for it he proceeded to

devote himself to its examination with the same audacious and irreverent spirit towards all that was currently respected or accepted, which characterized the Encyclopaedists. Like them, he tried everything by an infallible touchstone of his own, and from the altitude of his individual judgment pronounced everything that did not satisfy his taste to be irrational and unworthy of acceptance by any man whose eyes were not blinded by fanaticism. Like them, he was fonder of drawing logical inferences than of tracing historical causation, and by help of a purely abstract criterion of merit he undertook to pass judgment on the institutions of countries with which he had scarcely any acquaintance. And, like them, he delighted to mix himself in the current affairs of foreign nations, believing sincerely that a constitution good for Europe would require very slight modifications to make it applicable to Asia. Hence, in confident reliance on the efficacy of his infallible theories of jurisprudence, he was quick to offer his advice, often entirely unsought, to any nations disturbed by political convulsions, like the United States, Switzerland, Turkey, France, Portugal, and Spain. In this cosmopolitan enthusiasm the affairs of Spain came naturally to have a special attraction for him during the three years of Parliamentary government that followed the Revolution of 1820, when a nation seemed to be born in a day, and a people who had been regarded in December as ignorant slaves, became in April the advanced guard of European Liberalism. The activity of the nascent Spanish Cortes made it possible to hope for rapid and drastic legal reforms; so Bentham strove hard to bring himself before the mind of Spain.

Within five weeks from the king's acceptance of the restored Constitution, Bentham rushed into Spanish politics. On April 14, 1820, he wrote in the *Morning Chronicle*, as 'the most efficient channel for communication,' an appeal to Spain to relax the stringent language of the new oath of allegiance to the Constitution. In a few weeks more, he sent to the Cortes itself a present of his collected writings, and set to work composing pamphlets for translation into Spanish. One of them, 'Letters to the Spanish People upon the Liberty of the Press,' never reached the addressees; for the journalist Mora, who was to translate it, was thrown into prison for a political offence before his translation was finished. Bentham was more successful with his subsequent pamphlets upon Spanish affairs.

Of these, one relates to the Revolution itself, being concerned with the final collision between the people and the king's troops. When, in 1820, the movement for a restoration of the Constitution began, Cadiz, whose maritime situation has always rendered her

readily accessible to foreign, and consequently to Liberal, influences, was (as Byron describes her, and as 1868 again found her,) 'first to be free, as last to be subdued,' and her streets became at once the scene of great popular excitement. The 10th of March had been fixed, with the apparent acquiescence of the local military authorities, for the public proclamation, in the main square of the city, of the Constitution of 1812. But on that morning, just as the ceremony of proclamation was beginning, the military authorities, suddenly reversing their policy of non-interference, poured their troops into the crowded square, scattered destruction and death amongst the unarmed and astonished throng, killing upwards of 300 persons and wounding 1,000, and then surrendered the city for two days to the unrestrained passions of the soldiery. They little knew that at Madrid the king had already resolved to yield to the widespread demand of the nation; and that on that very 10th of March he was issuing a manifesto to the Spanish nation which concluded with words that became famous: 'Let us go forward boldly in the paths of the Constitution, and I myself will lead you.' When the track of revolution had been converted thus abruptly into the king's highway, there naturally arose at once a violent outcry for the prosecution of the military authorities of Cadiz, for having dealt so harshly with unfortunate citizens, whose only crime was that of going forward boldly in the paths of the Constitution four or five hours earlier than their king. A prosecution before a military court was accordingly ordered, and Colonel Hermosa was appointed to act as Public Prosecutor. But months and even years passed by without the prosecution being brought to any practical result; in spite of repeated complaints in the Cortes, and an emphatic declaration there by one Deputy O'Daly that 'heaven and earth were eager' for the prompt and exemplary punishment of the accused officials. On August 29, 1820, for example, one of these repeated complaints of the slowness of the prosecution was being made when, in reply to it, a letter was read from Colonel Hermosa, the official prosecutor. After explaining how great a mass of evidence it had been necessary to accumulate, he concluded with words which are noteworthy, not for their own novelty, but because they provoked the indignation of the irascible Bentham: 'I must remind the public that in judicial proceedings, deliberateness is a tribute due to justice; and that judicial forms are shields of our liberty; whilst hastiness is the greatest of perils for a judge.' These words, and a few others equally commonplace, were all that came to the ears of Bentham; but they sufficed to put his pen into action. The 'Peterloo massacre' of the Manchester reformers, the year previously, was still fresh in his memory; and he grudged seeing a

second armed force receive 'the same immunity (though not the same triumph or the same rewards)' as the Lancashire Yeomanry regiment.

One might have thought that a citizen of the world, who was taking upon himself to advise the Spanish nation with reference to its immediate political duties, would first of all have looked closely into the events of that fatal 10th of March in Cadiz, the condition of widespread discontent which they disclosed, and the evident hostility between the Spanish king's troops and the Spanish people, omens of very evil import for the constitutional régime which the Cortes was endeavouring to establish. But, far from this, Bentham contented himself with fastening upon the hackneyed phrases in Colonel Hermosa's commonplace letter, and proceeded to minutely examine in separate paragraphs, as if he were analyzing some formal academical thesis, whether or not judicial deliberateness is a tribute due to justice, and whether or not judicial forms are shields of our liberty, and whether or not hastiness is the greatest of perils for a judge. None the less it may be frankly admitted that Bentham's protest against forensic delays derived some corroboration from the issue of this great State Trial, which, after fifty-four offenders had been indicted, and some seven thousand pages of evidence had been taken, dragged itself on for more than three years, and finally terminated in handing over to punishment one solitary sentinel, who was in no way more guilty than his fifty-three fellow-prisoners;—a lame and impotent conclusion for the avenging zeal of the deputies of Cadiz and the vigorous intentions of the Cortes.

Another of Bentham's pamphlets on Spanish politics consists of a Letter to the Portuguese nation on the defects in the Spanish Constitution of 1812. That Constitution was so much admired in the south of Europe, that it had recently been adopted with enthusiasm at Naples (though at the moment when it was adopted there was not, according to Lord Brougham's informants, a single copy of it to be found in the whole city). And in Portugal the leaders of the insurrectionary movement, which broke out in October 1820, had taken an oath of fidelity to its rules. The Cortes of Portugal met in January 1821, and Bentham at once sent them a present of his works; which, on April 13, they accepted gratefully, and ordered to be translated and printed at the public expense. At this time their chief business was the drafting of a Constitution for Portugal on the basis of that of Spain. Bentham forthwith despatched to them this Letter, in which he explains the four defects that seemed to him to mar the Spanish Constitution; though he was anxious that they should

lose no time in adopting it, as soon as they had removed from it these blemishes.

The first defect is described by him as being that of an immutability which supposes infallibility on the part of the legislators. The charge is somewhat exaggerated, for a critic who prided himself so strongly as did Bentham upon his methodical precision; inasmuch as the supposed immutability and legislative infallibility were, by his own admission, limited to the brief period of nine years. Moreover, Bentham somewhat unfairly overlooked the fact that this nine years of stability was not guaranteed to all the enactments of the legislature, but only to the actual Constitution itself. For a document of such supreme importance, eight years of stability scarcely seems excessive; certainly not in Spain, whose repeated constitutional changes have vividly shown the evil of rapid fluctuations in a nation's fundamental laws. Fully two years after this, Brougham could exclaim in the House of Commons, 'The Spaniards have not changed one word of their Constitution of 1812; and God forbid that they should change a letter of it, so long as they have the bayonet of a foreign soldier at their breast!'

With a greater justice, Bentham points out as a second defect the singular rule which precluded deputies who had sat in one Cortes from being elected to the next one. At a later period, however, Bowring's stories of the demoralizing effect which a Parliamentary seat produced upon Spanish politicians led Bentham to recant his condemnation of this rule; and in his 'Constitutional Code' he abolishes re-eligibility. His biographer notes this as one of the only two occasions of importance on which Bentham is ever known to have changed his mind. Another point in the Spanish Constitution which Bentham censures is what he calls 'the sleep-compelling rule,' by which the Cortes could never remain in session for longer than four months at a time; a rule whose defects would, however, in our own day, be perhaps compensated by its tendency to concentrate upon active business the Parliamentary energy which is somewhat apt to lose itself in diffuse loquacity. The fourth and final defect which Bentham points out is the biennial duration of the Cortes. He thinks two years too long a period; and he supposes it only justifiable in Spain by the necessity of admitting deputies from the South American colonies, an inconvenient necessity which he soon had the pleasure of seeing Portugal delivered from by Brazil's declaration of Independence. Possibly the electors of our own day, with their experience of the inconvenience of repeated visits to the polling-booth, will think that biennial Parliaments would be not too long but much too short.

This Letter was formally read aloud in the Portuguese Cortes on June 29, 1821, and received much approval. But though the patriarch of Utilitarian politics, usually an acute critic of all the works of other men, could not discover in the Constitution of 1812 any defects beyond these four, there certainly must have been others, and weightier ones. For even when purged of these four errors, the Portuguese Constitution collapsed just as promptly as the unpurged one from which it was copied. The approving verdicts of political theorists seem to be no trustworthy test of the stability of a ship of state; for, as Señor Silvela well says, our experience of the rapid fall of the Constitution of 1812 in Spain, of 1822 in Portugal, and of other Constitutions in both countries in later years, gives painful proof of the fact that paper Constitutions are easily blown away by the wind.

A further pamphlet on Spanish politics is a Letter addressed to the people of Spain upon the proposed establishment of a Second Chamber. It belongs to the year 1820. 'I must humbly confess,' says Señor Silvela, 'that in the constitutional history of my country, I cannot find any trace of any proposal having ever been brought before the Cortes for any such purpose. And I may certainly say, with very little fear of contradiction, that as a mere problem of abstract scientific theory the question of a Second Chamber certainly did not trouble the minds of Spaniards at that time. No doubt at an earlier period in 1811, when the Constitution of Cadiz was being drafted, the question had been debated at some length whether or not the Cortes should consist, in the mediaeval fashion, of separate Estates. But, even then, no one suggested the possibility of organizing any of those Estates into a Chamber like the English House of Lords, based upon hereditary right and incapable of constitutional dissolution. Moreover, the Constitution elaborated in 1811 was restored in its full integrity on the revival of liberty in 1820. That second Parliamentary epoch began with the cry of "The Constitution for ever," and was maintained with the war-cry of "The Constitution or death;" and when the Parliament was put down by the intervention of the Holy Alliance, it died whilst enacting special legislation for securing the integrity of this "Sacred Constitution" (as the phrase then ran). Yet, to assure myself that no project of introducing a Second Chamber was then entertained, I have carefully examined the proceedings of the Cortes from 1820 to 1823 to see if any alteration was proposed in the Constitution. As might be expected, there was none. Not even in the dying throes of the Parliament, when the French army was already at Madrid to extinguish it, did the Cortes or the Liberals deem it possible to think of altering

a single comma of the Constitution of Cadiz. Hence not the slightest trace could be discovered of that supposed proposal to establish an Upper House, which provoked Bentham into writing this Letter to the people of Spain.'

Yet to Spain undoubtedly the Letter is addressed. It begins with these words, 'Men of Madrid, members of the Cortes, people of Spain! If the old man who thus addresses you is an intruder, listen to him with indulgence, he is not a spontaneous one. He would not have spoken had he not been called.' There can be no doubt then that this Letter is addressed to Spain herself and especially to her legislators; and that it was written by Bentham not officiously but at the request of some one who played a part in public affairs. Who was this person? The question is answered in the Brussels edition of Bentham's works by the historical preface, probably from Dumont's own pen, which is prefixed to this Letter. This preface says, 'As the question of the necessity of an Upper House was being discussed in Spain, a distinguished Spaniard, Señor Falgueira, sent Bentham a letter in which he earnestly begged him to give his opinion on this important point and to throw the weight of his name and his pen on the side of reason, justice, and democracy. This invitation from Falgueira gave rise to the following essay; which, as soon as it reached Madrid, was translated into Spanish by the same pen which had asked for it.' But here arises a curious historical doubt. 'To my surprise,' says Señor Silvela, 'when I came to inquire into the matter, I discovered that in neither of the two elections which took place in the 1820–23 period was any one of the name of Falgueira returned to the Legislature; and indeed that there is no ground for supposing that any Spanish politician of that name existed. But singularly enough in the neighbouring kingdom of Portugal a person of almost identical name, and an actual correspondent of Bentham's, Juan Bautista Felgueiras, was then playing a prominent part as a member, and even as a Secretary, of the Cortes of Portugal.' And he adds that to Portugal 'not only the name of Bentham's correspondent, but also the very subject of Bentham's Letter, seems to point. For though in Spain the question of an Upper Chamber was never raised in the second Parliamentary period when Bentham's Letter was written, yet the case was wholly different across the Portuguese frontier. There, in the debates of the Cortes upon the outlines for the new Constitution, some eminent orators, like De Araujo and Da Silva, maintained the importance of two Houses; whilst others, headed by the celebrated Borges Carneiro, preferred a single Chamber. This latter party, when the point came to be voted upon, secured

for the establishment of a single Chamber a majority of fifty-nine to twenty-six. Bentham's influence at that time was even higher amongst the Liberals of Portugal than amongst those of Spain. He had presented his writings to the Cortes of both countries; and the Portuguese recipients of the gift, unlike the Spanish, had ordered them to be translated at the expense of the State. Hence it would be natural enough if during the heat of the discussion of so important a constitutional point as Bicameralism, some Portuguese statesman should have thought it worth while to secure for his party the support of the authority of the great English philosopher.' But plausible as this conjecture of Señor Silvela's may be, it can hardly stand against the words of the Letter itself, which Bentham evidently addresses to Spain and not to Portugal, and against Bentham's own statement (in the London edition of the Letter) that, as soon as it had been translated into Spanish, some deputies of high rank at Madrid thought it so important as to propose that it should be formally read at a public sitting of the Cortes. Bentham adds that this reading actually took place, and amidst 'abundant and all but unanimous applause'; but Señor Silvela avers that 'the extant records of the Spanish Cortes make no mention of any such proceeding, or of any proposition on the subject.' It is possible, though unlikely, that Bentham was mistaken as to the Letter having been read to the Cortes. And it is clear that his Brussels editor was mistaken in supposing that the person who invited and translated the Letter was any (real or imaginary) Señor Falguiera; for Bentham himself says in the preface to the English version (and the title-page of the Spanish version corroborates him), that this person was J. J. de Mora, an advocate who edited *El Constitucional*, then the chief daily paper of Madrid. But, at the same time, Mora's preface disproves Señor Silvela's impression that the question of introducing a Second Chamber was not then being mooted in Spain; for he complains of 'the imprudent and ill-informed zeal which desires it.' And Bentham's friend Blanquiere, who was residing in Madrid when Mora's translation appeared, gives in his 'History of the Revolution in Spain' a clear account of the appeal from Spain to Bentham, and of the effect produced by the Letter. And Bowring, who was taking an active interest in Spanish politics, testifies (Bentham's Works, X. 516) that a 'desire for hereditary legislators' was arising in Spain in 1820; and attributes it to the influence of some of the refugees who were then returning from England, full of admiration for English institutions—a tribute to the House of Lords from an unexpected quarter. Señor Silvela is mistaken in supposing that there is any suggestion that the question was

ever discussed in the Cortes. All that even the Brussels editor alleges is merely that one Señor F. J. Reynoso stood for election as a deputy for the province of Seville just after writing a book in which he had recommended Spain to adopt a Second Chamber—stimulated to this recommendation, Bentham hints, by the hospitalities of Holland House—and thus his election came to turn upon this particular question. Reynoso's candidature and policy were actively supported by Riego, the hero of the Revolution of 1820; but in spite of this endorsement the electors decided against him. Bentham modestly hints that their decision was due to his Letter having appeared in Spain before the election was over. Reynoso's desire seems to have been for a Chamber of representative nobles, elected by their fellows. That the Chamber could only be representative, was rendered inevitable by the multiplicity of the Spanish nobles; who in 1788 had numbered 478,716, and by 1820 had become more numerous still (Blanquiere, p. 459). But there were two fatal obstacles to the scheme. One was the local inequality in the distribution of these nobles throughout Spain; some provinces having hardly any, whilst in Biscay and Asturias one person in every three had a title of honour. The other was the disrepute into which the whole order was falling; in the Cortes of 1813 there had been only three deputies who were not nobles, but in that of 1821 only one of the European deputies was a noble, the Conde de Toreno who became its President.

So far as concerns the contents of Bentham's Letter on this subject, it discusses nothing more than the limited and somewhat inappropriate question of the desirability of an Upper Chamber constituted exactly like the English House of Lords; with the same hereditary origin, the same powers, and, consequently, the same defects. Bentham therefore afforded no help on the question of the wisdom of reviving the two ancient Estates of ecclesiastical and civil dignitaries, which had been debated at Cadiz in 1811; nor on the question which Portugal was discussing in 1820, of the propriety of establishing two representative Chambers which, though alike based upon popular election, should vary in the qualifications required both for the electors and for their representatives; nor on the still more immediate question of the desirability of representing in one Chamber the people at large, and in a second Chamber the guilds and other corporate associations of national importance. Bentham merely applied himself to this bare question—'Shall we add to the assembly which the majority of the citizens have elected and which the majority of citizens can dissolve, another assembly which that majority has done nothing to elect, and which no constitutional power can dissolve?' When

the problem is stated in this extreme form, Bentham of course needs no further arguments than those which can be employed against the British House of Peers. The cosmopolitan philosopher, whom the Cortes of Portugal had enthusiastically entitled 'The Citizen of the World,' did not really utter this oracle of his for the world at large, nor even for the Spaniards to whom he seems to address it, nor even for the Portuguese who may have needed it, but simply for his fellow-citizens of the United Kingdom of Great Britain and Ireland. Bentham's Letter to Madrid belongs (as Señor Silvela says) to the homeward mail.

Bentham had written philosophically on the influence which differences of place and time should have in modifying the work of legislation; and had formulated consequent rules for adapting the laws of one nation to the circumstances of another. Yet, as we have seen, he rushed into Spanish politics with a thorough ignorance of the country to which he was offering his advice, completely forgetting that the first duty of a political writer is to take account of those local circumstances which must modify the application of his abstract theories. The same defect reappears in his second set of Spanish Essays, the seven Letters to the Conde de Toreno on the Draft Penal Code.

In August 1820 the Spanish Cortes had appointed a committee to frame a code of Criminal Law; and the task was prosecuted so energetically that in April of the following year the committee submitted a full draft of their proposals. In spite of the excitement of that revolutionary time, of the absence of any preparatory outlines for them to work upon, and of the profound change which, during the generation then living, had passed over the current European theories of penal jurisprudence, the committee had succeeded in producing in these eight months a code which Señor Silvela pronounces to have been 'certainly not inferior to any that were then in existence, and perhaps superior in some important points to the present Spanish laws.' The committee proposed that the Government should send copies of this Draft to all the Universities, legal corporations, and judicial functionaries of Spain, for the benefit of their criticisms; and should issue a public notice inviting all competent scholars to send in criticisms of their own. The proposal was adopted; and August 15, 1821, was appointed as the last day for sending in these comments. The critics proved to be as quick at literary work as the committee itself; so that by the autumn of 1821 suggestions had been sent in from ten courts of law, twelve Universities, and a variety of other public bodies, amongst which we may especially mention the Barcelona Association of Druggists. Unfortunately most of these memorials are now

lost; having been entrusted in 1836 to a subsequent commission on Criminal Law, whose secretary gave a receipt for them which is still to be seen in the office of the Ministry of Justice at Madrid, though every other clue to their whereabouts has long been lost. Had they been preserved, they would have constituted a very valuable picture of the views current in those times upon criminal jurisprudence; a summary of the prevalent opinions of men of learning and men of practice, which would have constituted an almost unique memorial of a noteworthy period in Spanish legal history.

When, in the spring of 1821, the Government had appealed to all competent scholars to add their quota to these criticisms, no special appeal seems to have been sent to Bentham; in spite of the thanks which the Cortes had voted him in the previous October 'for his readiness to co-operate in consolidating the Constitutional system' and of a proposal which he thereupon had made to draft them a complete body of laws for Spain. But, about a week before the expiration of the time for sending in criticisms to the committee, it occurred to the Conde de Toreno, who was then President of the Cortes, and 'perhaps the most influential man in all Spain,' that Bentham, whom he had pronounced to be 'the luminary of legislation and the benefactor of mankind,' would probably be able to throw some new and important light upon the Code. On August 6, 1821, he accordingly wrote to Bentham from Paris, where he was staying, and sent a copy of the Draft Code for his perusal. Bentham answered by seven copious letters; the first of them dated on September 11, the last of them on November 7. Before the former of those days the committee had of course finished receiving, and before the latter they had even sent in their report upon, the comments of their various corporate and unincorporate critics. They do not name Bentham in the list of those from whom they had received criticisms. Indeed Toreno's letter, asking for Bentham's views, shows plainly that he applied for them with no idea of their being submitted to the committee or even being put into print, but only in hopes that he himself might be able to make use of them 'in the discussion' which would take place in the approaching winter session of the Cortes. In fact, he was proposing to do for Bentham at Madrid precisely what Brougham habitually did for him at St. Stephen's.

By an ill-fortune, akin to that which swept away the bulk of the work of the other critics of the committee, the manuscript letters of Bentham are not now to be found amongst the papers which the Conde de Toreno bequeathed to his family. Señor Silvela adds that he has not been able to find any translation

of them into Spanish, or any trace of their having attracted any attention in Spain or having even been quoted in the Cortes when the Draft Code was discussed. Bentham, however, published them in England in the following year.

When Toreno thus addressed himself to the Englishman who had just made a modest offer to draft all the Codes which the Spanish nation might need, he may have had a suspicion that, if a legislator of such excessive ambition did condescend to accept the humbler office of a mere reviewer, his review would probably be neither very complimentary nor very useful. Nor was it. Bentham, in fact, in his very first Letter, almost entirely ignored the draft that had been submitted to him; and he dwelt upon the difficulty of giving any final advice to the Spanish jurists until he had completed a great work on which he had already been occupied for many years, and which was to embrace a complete view of the whole field of legislation and to be subdivided into eleven parts, whose titles and topics he proceeded to set out in detail. He made indeed no attempt to conceal the annoyance which he felt at not having been formally consulted by the Spanish government, when he had (as he considered) so many claims upon the gratitude of Spain. And he expatiated severely upon the invitation which had been addressed to the Universities, judges, and lawyers of Spain; persons whom he considered as so interested in the uncertainty and obscurity of the law that any desires of theirs would be sure to be directly opposed to public utility. Possibly Bentham would have felt the committee to be in less imminent danger of being misled, had he known that it was also receiving advice from a body of druggists. He must have forgotten that only ten months previously he had eulogized a Madrid advocate in the first of his Spanish Tracts, and had declared authoritatively that 'it is only in England that to lawyers and churchmen everything that tends to the happiness of the greatest number is an object of abhorrence.' Spain, however, did not share Bentham's distrust of the authority, in legal matters, of all men who have had a life-long familiarity with law; nor could the Cortes very well afford to wait until he had finished the great work which he had been labouring at for so long, and which when death seized him at the mature age of eighty-four still remained scarcely begun. Evidently Bentham considered that this mere unofficial appeal to him did not deserve to be treated with any particular return of politeness; for in even his first Letter he treats the committee and their Code with much grotesque Benthamic banter. And he goes so far as to handle the dignified Toreno himself somewhat roughly, as 'a functionary who has points of his own to compass' and conse-

quently would be likely to use Bentham's epistles only for the purpose of giving support to those points. Toreno had written to Quixote, but had been answered by Sancho. The Letter must have seemed to the grave Spanish aristocrat a most extraordinary production; and the stately note of cold politeness, in which he acknowledged its arrival, affords a fine picture of Castilian dignity, wounded yet still courteous. He took no further notice of Bentham's Letters, made no use of them in the Cortes, and, as we have seen, did not even preserve them. Yet Bentham, with his curious ignorance of the world and its ways, considered himself the injured party; and, in publishing these Letters, gave an account of the quarrel, gravely adding, 'To the hermit at London, all this is opaque; at Madrid, it perhaps is transparent.'

In spite, however, of this unpromising beginning, Bentham's Letters to Toreno were no fewer than seven, and of great length. But they were evidently intended, not as a genuine criticism of the Draft Code, but as a political philippic against a great part of the existing legislation of Spain. He wrote, not for the sake of assisting either Toreno or the Cortes, but in hopes of attracting to himself popular attention in Spain; 'with a view, I must confess, to my offer' of drawing up an entire body of Spanish legislation. These seven Letters discussed successively:—firstly, the danger of checking the free criticism of a country's laws: secondly, the unwisdom of silencing national desires for a reform of the Constitution; thirdly, the evil of sacrificing minorities to majorities; fourthly, the precautions which had been taken to exclude all ideas which were not those of the committee themselves; and fifthly, in the final letter, ecclesiastical persecutions. Bentham characteristically reproves the committee for announcing that they would adopt only such suggestions as might be 'in harmony with the political condition of our country.' He preferred men like his Spanish translator, Mora, who is said to have always desired 'legislation that recurred to first principles, without reference to existing systems.' Very severely, too, do the Letters criticize the rigour with which the framers of the Code had denounced the heaviest penalties, even that of death itself, against all seditious attacks upon the new Constitution. They regarded it as the greatest of public benefits; and, like good Utilitarians, judged that all assaults upon the greatest good ought to be checked by threats of the greatest evil. They forgot that no legal threat of punishment can be efficacious unless there is a force behind it, to make the threat be something more than a piece of advice: and that this force lies only in the public prestige which the legislator enjoys. If the Spanish Constitution had so little popular roothold as to be

in much danger from sedition, the needed force was lacking, and the greatest threats were useless. How far Bentham was from knowing or even suspecting the condition of the country for which he thought himself competent to frame an entire body of law, is shown by the fact that, when examining this proposal to make it a capital offence to attempt to change the constitutional form of government, he remarks with the greatest simplicity that all such punishments are needless in any country where the government's only aim is the greatest happiness of the greatest number. He illustrates this by the example of Colonel Burr, who had attempted to proclaim himself Emperor of Mexico and the United States, but whose attempt had been received by the Americans with no severer punishment than laughter, and who was still to be seen walking about New York in the peaceful enjoyment of all his liberties. But the Burr anecdote, even if Bentham's report of it be strictly authentic, was scarcely a valid precedent for such a country as was Spain in 1821; when bands of insurgents were becoming so numerous as to necessitate a special legislation against sedition, authorizing the prompt arrest of political leaders on mere suspicion, and when the Cortes was occupied in the desperate defence of the Parliamentary Constitution which was already on the verge of its overthrow. Impotent as all legal severity proved to be to defend it, still more impotent would have been the American indulgence which left Colonel Burr to the free enjoyment of all the felicities of a New York existence. Liberal politicians of a more practical type would perhaps have realized that the free institutions which had just been won, and whose frail existence was threatened on all sides by imminent perils, had much more to fear from royal hostility on one hand, and from popular misuse of the new-won liberties on the other, than from the checks that restrained the liberty of the press or postponed for nine years any proposals for reforming the Constitution,—which needed no reform half so urgently as it needed a little breathing-space to give it time to take root in the affections of the nation.

This evident gulf between Bentham's abstract theories and the actual facts of Spanish life, the contempt which he showed for the committee and their Draft Code, the attitude of superiority which he assumed towards the Cortes, the lack of exactness in many of his criticisms, and the frivolity with which he expressed them—a frivolity unbecoming in a man of his nationality and of his eminence—caused these Letters and their counsels to be completely ignored in Spain. Bentham had expected rather to be assailed than to be ignored. He had thought, from the outset, that his Letters might even be suppressed by the censorship and the printer

prosecuted; and had therefore taken the precaution of appealing to Toreno to use all his influence to remove any obstacles to their publication. Bentham solemnly warned the Conde that if he did not do this he would be preferring private utility to public, and showing himself an enemy of the greatest good of the greatest number. Consequently he threatened him that in any event the Letters would be published in various languages, and especially in French; so that any disloyalty of his to Bentham would be criticized in the salons of Paris. The Penal Code passed safely through the perils of revision; and nominally took effect in July 1822. But the political convulsions which immediately ensued prevented it from ever coming into active operation; and probably also prevented the quidnuncs of Paris from ever having time to indulge in any epigrams concerning Bentham and the Conde de Toreno and the seven Letters on the abortive Criminal Code.

COURTNEY KENNY.

IS COPYRIGHT A CHOSE IN ACTION?

'ACCORDING to my view of the law,' said Lord Justice Fry in the *Colonial Bank* v. *Whinney*[1], 'all personal things are either in possession or in action. The law knows no *tertium quid* between the two.'

Mr. Williams, in his work on Personal Property[2], speaking of shares in joint stock companies, patent rights and copyrights, says: 'For want of better classification these subjects of personal property are now usually spoken of as choses in action. They are, in fact, personal property of an incorporeal nature.' It is not very clear whether Blackstone[3] intended to include copyrights, patents, and trade-marks among things in possession or in action. Sir Howard Elphinstone, however, in an article on choses in action in this REVIEW[4], is of opinion that they are neither choses in action nor choses in possession.

Of one of these subjects at least, shares in joint stock companies, the House of Lords[5], in the case mentioned above, took the view expressed by Mr. Williams. In that case it was held in the Court of Appeal[6] by Lords Justices Cotton and Lindley, Lord Justice Fry dissenting, that shares, of which the certificates were in the hands of a trustee for a firm of stockbrokers at the time of their bankruptcy, were not choses in action so as to come within the exemption mentioned in the 'reputed ownership' clause of the Bankruptcy Act, 1883[7].

That decision was reversed by the House of Lords, and Lord Blackburn, in giving judgment, said[8]: 'The principal argument used by counsel for the respondent, and it seems to have prevailed both with Cotton L.J. and Lindley L.J., was that choses in action, of which things in action is a translation, had a technical sense in our old law limited to the right to sue for a debt or damages. I do not think that made out. There was always a difference

[1] 30 Ch. D. 285.
[2] Thirteenth edition, p. 13. [See now fourteenth edition, pp. 40–41, where this passage is much expanded and altered, and Mr. Cyprian Williams carefully distinguishes copyrights and patents from shares.—ED.]
[3] 2 Steph. Comm., tenth edition, pp. 8 & 9.
[4] LAW QUARTERLY REVIEW, ix, pp. 311, 314, 315.
[5] 11 App. Cas. 426.
[6] 30 Ch. D. 261.
[7] 46 & 47 Vict. c. 52, sec. 44, sub-sec. (iii.)
[8] 11 App. Cas. 439.

between personal property such as to be capable of being stolen, taken, and carried away, and so to be made the subject of larceny at common law, and to be capable of being seized by the sheriff under a fi. fa., and other kinds of personal property. Personal property of the first sort, when belonging to a married woman, vested at once in the husband. The others the husband might reduce into possession, but did not have till he had done so. And when new kinds of property like stock in the funds, or, in more modern times, shares in companies, were created, questions arose as to whether they were within the principle of being in possession or not; but till the phrase was used in the Act of 1869 it never became important to inquire whether they were to be called things in action or not. But it is noticeable that in *Dundas* v. *Dutens*[1], Lord Thurlow, speaking of stock in the funds, said: "Those things such as stock, debts, &c., being choses in action, are not liable. They could not be taken upon a levari facias." The reason was the same as that for which they could not be the subject of larceny at common law, because they could not be seized. But Lord Thurlow thought choses in action an apt expression to use with regard to such things. Again, shares are not within the seventeenth section of the Statute of Frauds because they do not pass by delivery: Lord Denman in *Humble* v. *Mitchell*[2] thought choses in action a proper phrase to express that idea. Again, in *Ex parte Agra Bank*[3], Wood L.J., in speaking of an assignment of shares, uses the phrase "whether in an assignment of a chose in action." He had no need to inquire whether it was a strictly correct phrase, but to him it appeared, as it had done before to Lord Thurlow and Lord Denman, that the phrase expressed the idea. And I think it was hardly disputed that in modern times lawyers have, accurately or inaccurately, used the phrase "choses in action" as including all personal chattels that are not in possession. In what sense, then, is it used in the fifteenth section of the Act of 1869, from which the present enactment is taken? It is not disputed that these words show that the legislature intended to take policies of insurance out of the order and disposition clause. Why not shares in companies also? I cannot answer that question in any way satisfactory to my mind.'

It is clear from the authorities cited by Lord Blackburn that shares in joint stock companies and stock in the public funds must now be classed as choses in action.

A copyright, like a share, cannot be the subject of larceny at common law; it cannot be taken in execution under a fi. fa.[4], nor,

[1] 1 Ves. jun. 196, 1 R. R. 112.
[2] 11 A. & E. 205.
[3] L. R. 3 Ch. 555, 560.
[4] *Stephens* v. *Cadey*, 14 How. (Amer.) 528.

it seems, need a contract for its assignment be in writing[1]. By virtue of the Copyright Act of 1842 it is personal estate[2]. It is in its nature incorporeal. Is it a chose in action?

The following definitions have been given of choses in action: 'We will proceed next,' says Blackstone[3], 'to take a short view of the nature of property in action, or such where a man has not the occupation, but merely a bare right to occupy the thing in question: the possession whereof may however be recovered by a suit or action at law: from whence the thing so recoverable is called a thing or chose in action.'

Mr. Williams says[4]: 'The term choses in action appears to have been applied to things to recover or realize which, if wrongfully withheld, an action must have been brought; things in respect of which a man had no actual possession or enjoyment, but a mere right enforceable by action.'

Blount, Cowell, and Jacob, who all derive the definitions given in their Law Dictionaries from the same source, Brooke's Abridgement, state that a 'chose in action is a thing incorporeal and only a right: as an annuity, obligation for debt, a covenant, voucher by warranty, and generally all causes of suit for any debt or duty, trespass or wrong, are to be accounted choses in action. And it seems chose in action may be also called chose in suspense, because it hath no real existence or being, nor can property be said to be in our possession[5].'

Mr. Sweet, in his article on choses in action in the October[6] number of this REVIEW, admits that the 'learning on this subject has grown up in an irregular way characteristic of the English law,' and that 'until the last few years it has been treated by our text writers rather as an incident to some other branch of law than as a subject by itself.' It may be due to the subordinate position which it has occupied, as well as to a certain laxity of expression, that the confusion which becomes apparent upon an examination of the above definitions has been allowed to creep into this branch of the law.

It is evident, I think, that the authors of the definitions given above included under the same name different classes of what I will, for the present, call property.

Blackstone, when he spoke of choses in action, was apparently thinking of the *fruits* of an action—something, that is to say, 'the possession whereof,' to use his own words, 'may be recovered by

[1] *Gould* v. *Banks*, 8 Wend. (Amer.) 562.
[2] 5 & 6 Vict. c. 45, sec. 25.
[3] 2 Black. Comm. 396.
[4] Pers. Prop., fourteenth edition, p. 27.
[5] [This definition is not in Brooke *sub tit.* 'Chose in accion & chose in suspense.' It would seem to have been made up by Cowell.—ED.]
[6] LAW QUARTERLY REVIEW, x. p. 303.

an action.' This is, I think, borne out by his description of the various kinds of property which might in his opinion be termed choses in action. 'Thus,' he says, '*money* due on a bond is a chose in action: for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession until recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the *recompense for this damage* is a chose in action; for though a right to some recompense vests in me at the time of the damage done, yet what and how large such recompense shall be, can only be ascertained by verdict: and the possession [of the recompense] can only be given me by legal judgment and execution [1].' And again: 'But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it [i.e., the thing] is called a chose in action [2].' It is the money due upon a bond, or the money to be paid as recompense for an injury of which Blackstone is thinking. The idea presented to his mind by the expression 'chose in action' is a corporeal something in which one individual is said to have property, but of which another has—or is presumed by law to have—the actual physical possession, subject to the power of the former to unite property and possession in his own person by means of an action.

Mr. Williams' definition is evidently intended to include things both corporeal and incorporeal: everything, apparently, of which the owner has not actual physical possession, either because it is in the possession of some one else, or because it is incapable of physical possession on account of its incorporeality [3].

Lastly, the definitions given by Blount, Cowell, and Jacob include only things which are intangible: mere rights. The division of property into things in possession and things in action is, in this case, the equivalent of the Roman law division into things corporeal and things incorporeal. Which of these classifications is the correct one?

Both Mr. Sweet [4] and Mr. Cyprian Williams [5] find fault with Blackstone's definition; but the objections which they urge are objections not to the form of the definition, but merely to the extent. It is not apparently disputed that property in action is something, 'the possession whereof may be recovered by an action; from whence the thing so recoverable is called a thing or chose in action.' Mr. Williams agrees that the term is applicable to 'things to *recover* or realize which, if wrongfully withheld,

[1] 2 Black. Comm. 396. [2] Ibid. 397.

[3] Pers. Prop., p. 9, note (g), & p. 10 [13th ed., materially altered in 14th ed. p. 28. —Ed.]

[4] Law Quarterly Review, x, p. 315. [5] L. Q. R. x, 145, 146.

an action must have been brought.' Coke and Littleton appear to mean the same thing in the sentence: 'And so note that an action real or personal doth imply a recovery of something in the reality or personality, or a restitution to the same[1]. In *Lampet's* case[2], moreover, Coke appears to distinguish between rights and choses in action when he speaks of 'the great wisdom and policy of the sages and founders of our law, who have provided that no possibility, right, title, nor thing in action shall be granted or assigned to strangers.'

All these great lawyers, therefore, agree in this: that a chose in action must be—or, at any rate, may be—something of which it is possible to recover possession.

Those writers who define a chose in action as 'a thing incorporeal, and merely a right,' are met with the difficulty that, having attempted to follow the Roman law and divide all property into two classes, corporeal and incorporeal, they have adopted a nomenclature which will in reason prevent them from so doing. For either they will be obliged to include among choses in possession things which are assuredly not in either actual or constructive possession, or they must form a third class to include property which, upon the face of it, the idea expressed in the term 'choses in action' would seem to be most apt to include. In the actual possession of the reputed owner it is evident that such things as money due upon a bond or damages in respect of breach of contract are not; and although 'constructive possession' is a very elastic term, it does not seem to be sufficiently elastic to cover such cases as these. At any rate, if it can be so stretched as to include a claim to possession as opposed to an actual hostile control, that would not appear to satisfy the requirements of the definitions, for in such a case there would certainly be no actual use or enjoyment by the legal owner.

Mr. Cyprian Williams is of opinion that, whatever may have formerly been the case, in modern times the phrase 'chose in action' has been limited to such incorporeal things as rights. But this is scarcely borne out by the phraseology of the Judicature Act, 1873. The section[3] of that Act which relates to the assignment of choses in action is as follows:—

'Any absolute assignment . . . of any debt or other legal chose in action, of which express notice shall have to be given to the debtor, trustee, or other person from whom the assignor would have been entitled *to receive or claim such debt or chose in action*, shall be, and be deemed to have been, effectual in law . . . to pass and transfer the legal *right to such debt or chose in action* from the date

[1] Co. Litt. 289 b. [2] Coke's Rep. pt. x. 48 a. [3] Section 25 (6).

of such notice.' It is clear that chose in action must here refer, not to any incorporeal right, but to something tangible which the assignee can actually and physically receive.

But what is the meaning of the words 'other legal chose in action?' Can, for instance, a horse under any circumstances be a chose in action? Supposing that *A* promises me one of the horses in his stable upon the fulfilment of a certain condition, and that, when I have fulfilled the condition, he refuses to give me any one of his horses, am I at liberty to take any horse I please, or must I not rather invoke the aid of the law to select the particular horse which I am to have? Does not this constitute a chose in action? Or supposing that *A* offers me a particular horse, but when I have fulfilled the condition, hides it or otherwise prevents me from taking it, may I not bring an action for the horse, and does it not then become a chose in action? In the latter case at all events, property passes to me upon the fulfilment of the condition, but I have no enjoyment until, by the aid of the law, I can obtain possession The horse, therefore, is certainly not a chose in possession; if it is not a chose in action, what is it?

In the earliest reported case in which the expression 'chose in action' occurs, it is used of a corporeal chattel—a box containing title deeds. Again, in the case of *Franklin* v. *Neate*[1], which Mr. Cyprian Williams cites in support of his statement that a corporeal chattel is not a chose in action, it appears that Baron Parke, who tried the original action with a jury, was of opinion that the subject-matter of the action, a pledge, was a chose in action, and so directed the jury. In *Lampet's* case[2] there seems to be a distinction drawn between rights and things in action. And, lastly, the Judicature Act speaks of *receiving* choses in action, showing that those who framed that Act were thinking, not of the right of action, but of the fruits of the action.

I submit, then, that it is clear that things corporeal may be choses in action, and, further, that it is very doubtful whether rights, or in fact anything incorporeal, can properly be included in the term; the inclusion of such things being probably due to a confusion between the right and its subject-matter[3]. How can it be said that a right lies in action when in the usual course of things the person to whom it attaches can exercise it without having recourse to an action throughout the entire period during

[1] 13 M. & W. 481.

[2] Coke's Rep. pt. x. 48 a.

[3] In the case of such incorporeal subject-matter of rights as a reputation, an action if brought is generally for damages in respect of the infringement of the right, and not, directly at all events, to recover the reputation; and it is suggested that the train of reasoning applied later in this article, in the case of a copyright, is equally applicable in such a case as this.

which it is vested in him? If an action is brought in respect of a right, it is for an infringement of it, and is in the nature of an action for trespass; it is brought not for the recovery of the right, but for an acknowledgment that the right actually exists. It is the recompense to be made for the infringement of the right, not the right itself, which lies in action. If the owner of a house lets it to *A* for six months, and at the end of that time *A* wrongfully refuses to give up possession, the owner of the house has, as owner, a right to possession and a right to use and enjoyment, but he is, for the moment, incapable of exercising these rights because the house is in the hands of another. If he brings an action of ejectment, it is not to recover rights—which at the end of six months re-vest in him without any exertion on his part—but to recover the actual corporeal chattel, and thereby indirectly to obtain an acknowledgment that those rights exist.

Again, is a right property in the sense of something of value which can be the subject of purchase and sale? What is the value of a right as a right? Surely, nil! Is it anything more than a chain by which, legally, an individual is linked to all those corporeal things[1] of which he either has or, in contemplation of law, should have, actual physical control? Quite apart from the rights given to an actual possessor by law, a tangible object must always have had a value. An iron bar was of value to the savage who found it, although a stronger than he might take it from him; as long as he only met savages as strong as himself, the iron bar had a pecuniary or exchangeable value. But apart from the tangible object, between which and the individual whom the law calls owner it forms the connecting link, a legal right has no real value: it has not even an existence. It is true that the law allows nominal damages for violation of a right, but this is merely as an acknowledgment of the existence of a certain legal condition. In order to obtain substantial damages, the claimant must show that some injury has been done to something which is property—be it a thing corporeal such as a house, or incorporeal such as a reputation—in the sense that, apart from the law, it has an intrinsic value. I submit, therefore, that rights are not in reality property either in action or in possession, but are merely *vincula juris* by which property and persons are bound together, and should be classed accordingly.

But supposing that rights are property, and that, in the words

[1] Of course, if the subject of the right is incorporeal there cannot be an actual physical control, but there will be a control which, except for the intangibility, will be identical with the control over a corporeal object, and therefore must, I submit, be a constructive control.

of Lord Justice Fry[1], 'the law knows no *tertium quid*' between property in action and property in possession, to which of these two kinds of property do they most nearly approximate? Surely, to property in possession.

Let us take the particular case of a copyright as typical of rights generally.

Copyright is defined, by the Copyright Act of 1842[2], as 'the exclusive liberty of printing or otherwise multiplying copies' of a book or other literary work. It involves, therefore, the power to exercise three rights in relation to a literary work. In the first place, the author may publish the book to the world; in the second, he may make as many copies as he pleases between the date of publication and a fixed date thereafter; in the third, as an accessory to the other two, he may prevent any one else who is under the influence of the same law from doing likewise. Copyright, therefore, like the vast majority of other rights, is the legal power to deal with a piece of tangible property in a particular manner.

A share, as we have seen, has been judicially decided to be a chose in action[3], and several writers have, for want of a better classification, included copyrights and patent rights also in this category, apparently on account of the supposed resemblance that they bear to one another. But I think that the inclusion of copyrights and patents, in the term 'choses in action,' on the ground of their analogy to a share, was owing to a confusion between the actual property which, though unapportioned, constitutes what is called a share, and the right of a shareholder in relation to the share.

There is undoubtedly a very noticeable distinction between a share in a company and a copyright. A share is an undivided portion of assets in the control of a company in relation to which the shareholder has certain rights. In the case of a share there is a person who holds, in relation to the shareholder, a position which bears a considerable analogy to that which is held by a debtor in relation to his creditor. That person is the company. It is true that it is only in certain events that the shareholder can recover his capital by obtaining from the Court an order for winding up the company. But there is always a possibility of recovering possession of the property parted with—a possibility realizable by a form of action. Until the petition for winding up is presented, the share is in the possession or control of the company; in relation to the shareholder it is a mere potentiality. By means of the petition the shareholder reduces the share, or its proceeds, into his possession, and the relation of shareholder and company comes

[1] *Colonial Bank* v. *Whinney*, 30 Ch. D. 285.
[2] 5 & 6 Vict. c. 45, sec. 1.
[3] *Colonial Bank* v. *Whinney*, 11 App. Cas. 426.

to an end in a manner precisely similar to that in which, by the payment of a debt, the relation of debtor and creditor is extinguished. There is, in fact, an obligation arising out of a contract between the company and the shareholder. The shareholder has not occupation, but he has a right to occupy the pecuniary equivalent of his share upon the non-fulfilment by the company of the promises which induced him to part with his money. A share, therefore, if not strictly a chose in action, bears a close resemblance to it.

Very different is the position of the proprietor of a copyright. Taking, for instance, a case in which the original owner of a copyright has parted with the whole of his interest in his work and has executed a written assignment in conformity with the provisions of the Copyright Act 1842, what is the position of the assignee?

If, after he has duly registered his name at Stationers' Hall as proprietor, the assignee has not the 'occupation,' he certainly has not a 'bare right to occupy.' There is nothing that he can obtain by bringing an action. Unless and until some one pirates the copyrighted work, nothing is being withheld from him. The person who alone could stand in the same position with regard to the assignee of the copyright, as does a debtor to his creditor, is the assignor; but by the due execution of the assignment the assignor parts with his entire interest in the copyright, and thenceforth has no more control over it than has an absolute stranger[1]. So that the difference between a debt and a copyright is, that in the case of a debt the creditor is said to have property in the money owing, and has also a right to the possession at present vested in the debtor—a right realizable by an action; while, in the case of a copyright, if the assignee does not obtain possession at the same time as he obtains property—namely, at the date of the execution of the assignment—he can never obtain it at all, for the reason that, as has been pointed out, it is not in the assignor, and there is, therefore, no one against whom an action can be brought for its recovery.

Then, has the assignee of a copyright possession? I submit that he has.

Mr. Williams' definition of a chose in action is that of which a person has 'no actual possession or enjoyment;' of a debt or of money due upon a bond the creditor and the holder of the bond respectively have neither possession nor enjoyment until the money is actually paid into their hands; of a copyright, the assignee has

[1] The action for infringement of a copyright is not analogous to an action to recover a debt. The remedy in the former case would originally have been an action on the case similar to the action for disturbance of an exclusive franchise *Blackeler* v. *Gillett*, 19 L. J. C. P. 307; *Newton* v. *Cubitt*, 31 L. J. C. P. 246), in the latter an action of debt or assumpsit.

enjoyment as soon as the assignment is executed, but he has not the possession in the sense of physical control.

There is, however, another kind of possession recognized by the law: constructive possession. The term 'constructive possession' is generally used to denote those cases in which the person who has an immediate right to possession is not, as a matter of fact or law, in possession at the time, but is nevertheless permitted to bring, for the protection of his property, actions usually available only to the person exercising (in person or through a servant or other mere custodian) physical control. The phrase is, however, ambiguous, and might, it is conceived, be not improperly applied to cases in which, while the owner of property has not—and, owing to its nature, never can have—a physical control of the property, he yet has the same full use and enjoyment, so far as the nature of the property permits, as he would have were the property corporeal and he in physical possession.

Such a possession of incorporeal property, indeed, seems to have been recognized by Littleton[1] when he admitted that an advowson was capable of possession 'because a man hath in it as absolute ownership and property as he hath in lands and rents.' Of such incorporeal things as offices, seats in the House of Lords[2], and exclusive franchises[3], there may, it appears, be possession. If incorporeality does not in these cases prevent the owner from having possession, why should it in the case of a copyright?

'For the present we start with this,' write Sir Frederick Pollock and Mr. Justice Wright in their work on 'Possession in the Common Law[4],' 'that any of the usual outward marks of ownership may suffice, in the absence of a manifest power in some one else, to denote as having possession the person to whom they attach.' And again[5]: 'De facto possession is the sum of acts of ownership, and when the owner of a thing is ascertained, he is entitled to act as owner in every lawful way, unless it appears that he has divested himself of some part of his general powers. And as the first condition of exercising full dominion he is entitled to undisturbed control of the thing.'

In the written assignment, and in the entry of his name upon the register at Stationers' Hall, the assignee of a copyright has outward marks of his ownership, and there is not only no manifest power, but no power at all in any one else. De facto possession

[1] Co. Litt. s. 10. 17 a.
[2] Pollock and Wright on Possession in the Common Law, pp. 35, 36.
[3] In the cases of *Blacketer* v. *Gillett* (19 L. J. C. P. 307), and *Newton* v. *Cubitt* (31 L. J. C. P. 246), the declaration alleged that the plaintiffs 'were lawfully possessed of an exclusive ferry.'
[4] Page 2. [5] Page 25.

—if by that term is meant physical control—the owner of a copyright cannot have, owing to the nature of his property, but he has as full a dominium as under the circumstances is possible, and therefore he presumably has also a possession, if only a quasi or constructive possession. Is it not possible that it was a misapprehension as to the extent of the term 'possession,' and the belief that it covered merely those cases in which there was an actual physical control, which has led to the extension of the term 'choses in action' to include incorporeal property generally?

Mr. Sweet suggests that under the law existing prior to 1870 it would have been open to a husband upon marriage to reduce his wife's copyrights into his possession by registering them in his name. But there is an obvious difference between the reduction into possession by a creditor of a debt owing to him by means of an action, and the reduction into possession, under the old law, by a husband of his wife's copyright by means of registration. In the former case the creditor obtains control and enjoyment of that which was, before the action, said to be his property, but of which he had not the full use and enjoyment. In the latter, the husband would have obtained merely the same rights which the wife had formerly enjoyed, and therefore it is difficult to see why, if after registration in the husband's name the copyright was in his possession, it was not in the wife's possession when registered in her name. But whether a copyright is a chose in action or a chose in possession the husband would, apparently, have been obliged to register his own name together with his wife's at Stationers' Hall before an action could have been brought for infringement of the wife's copyright, and therefore this is perhaps hardly a good test of its nature.

Copyright certainly seems a proper subject for exemption from the reputed ownership clause of the Bankruptcy Act, 1883; for that section[1] was passed with the object of preventing persons from obtaining a fictitious credit by having on their premises property which did not belong to them, and it is difficult to see how any one could obtain credit through the possession of such an intangible thing as a copyright. But it is perhaps doubtful whether the clause could have any application in the case of a copyright, for, except when there has been an actual transfer, the copyright cannot be said to be in the order and disposition of the publisher, since a transfer will not be presumed unless the intention to transfer has been unmistakably manifested, as, for instance, by signing a receipt for the purchase money[2]. And therefore probably not even for the purpose of escaping from this enactment

[1] 46 & 47 Vict. c. 52. sec. 44. sub-sec. (iii). [2] *Lotowr* v. *Bland*, 2 Stark. 382.

is it necessary that a copyright should be classed as a chose in action.

To sum up, then, there is this great distinction between debts, money in the funds, and perhaps shares, and such intangible forms of property as copyrights and patents, that while in the former cases there are two parties standing towards each other in the relation of debtor and creditor, the legal owner—the creditor—not having enjoyment of his property; in the latter there is a single person only, who is legal owner, and who has enjoyment of his property as far as he can ever have it. These various kinds of property 'are so different in their nature and legal incidents, that care must be taken not to be misled by giving them all a common name which conceals their differences [1].'

An attempt to identify the division of property into choses in action and choses in possession, with the division into things corporeal and things incorporeal, can only lead to confusion, and therefore copyrights, patent rights, and rights of all kinds, if they must be classed as property at all, should be classed under the head, to which I submit that they more properly belong, of property in constructive possession.

SPENCER BRODHURST.

[If copyright must needs be a thing either in action or in possession, I agree that it must be in possession. Clearly an action against an infringer is in respect of a new and distinct cause of action, and reduces into possession not the right but the damages for violating it. On the other hand, infringement of such rights is not at all like disseisin, not even like disseisin of rent, for the party entitled is not deprived of any certain sum due to him.—ED.]

[1] Lindley L. J. in the *Colonial Bank* v. *Whinney*, 30 Ch. D. 284.

MAINTENANCE AND EDUCATION.

IN his article on this subject in LAW QUARTERLY REVIEW, vol. x, p. 330, Mr. T. K. Nuttall lays great stress upon an ill-reported case of *Knapp* v. *Noyes* (1768), which is to be found in Ambler 662 (not 661). In a footnote to Mr. Blunt's edition, the learned editor says that he 'has been unable to meet with any entry of this case in Lib. Reg.,' and the rest of the note is taken up with the order in the preceding case of *Bibin* v. *Walker*, to the confusion of the reader. I have been at the pains of searching for the record and have found the original bill, which was filed on April 20, 1763, amended by order of the Court on June 23, 1764, and the reference to which is 'Chancery Proceedings, 1758–1800, No. 517.'

It appears that the testator, George Noyes, made his will on August 27, 1748, and died in August, 1752. His wife Ann was appointed executrix, and alone proved the will, and it is to be noticed that she was one of the respondents, together with the eldest son and her daughter, Ann the younger. The oratrix was another daughter, then named Sarah Knapp, wife of the orator, and it was alleged and admitted that these persons had intermarried with due consent. George and Elizabeth died before the testator, and Mary, the remaining child, died unmarried before bill filed.

The material portions of the will, as far as contained in the amended bill, were as follows:—the testator 'gave and bequeathed to every one of his daughters, Ann, Sarah, Mary, and Elizabeth, and to his younger son George, the sum of £1,500 apiece, to be paid to his said daughters respectively on their several marriages, with the consent of his executrix and executor therein named, and the survivor of them. And in case any or either of his said four daughters should marry without such consent, then he gave them respectively the sum of £500 and no more, and directed that after every such marriage without consent, £1,000 should be paid to, and among, such of his daughters as and when they should marry with such consent, in equal portions, and did will that his son George's £1,500 should be paid him if, and when, he should attain the age of 21 years. And in case his said daughters and his son George, or any of them, should die before their respective legacies should be payable, he did will that the legacy and legacies of him, her, or them, so dying, should be paid to, and amongst, all his then

surviving children (except T., and the daughter or daughters so marrying without such consent), equally share and share alike such legacy or legacies of him, her, or them, so dying, to be paid to his said surviving children, as and when they should be severally entitled to receive their legacies of £1,500. . . . And it was his will that after his said wife's decease, interest after the rate of 4 per cent. for £1,500 apiece, to be paid to every one of his said daughters and younger son George, then living, *every year for their maintenance and education, to the time their respective legacies should become payable*, and did charge all his lands, tenements, and hereditaments with the payment of such interest.' He also appointed his executor and executrix guardians of his infant children. The claim was for accounts, &c., for immediate payment of the sums accruing directly and by substitution and representation, and this involved the question of the time when the portion of Mary was payable [1].

Ann, the widow and executrix, denied assets, alleged maintenance and education of the oratrix from the testator's death to her marriage, and payment of interest thenceforward for a great part of the time. She further alleged that a certain estate was given her for life, that she might be the better enabled to maintain, educate, and provide for the children, and claimed that there was no charge thereon which could take effect until her death, the complainants disputing this claim.

The real question before Lord Camden was whether the testator meant to restrict the marriage with consent to under the age of 21, or intended his executor and executrix to have a general power to whatever age. The Lord Chancellor plainly states that he would find for the plaintiffs with reluctance, and he then proceeds to discover reasons for restricting the consent, a course which all Equity judges have been forward to adopt. If he could hold that Mary was entitled to be paid on attaining 21, the gift-over would not take effect, but her legal personal representatives would be entitled. He finds two reasons, one, that the executors (who were also guardians) were the people to consent, and as guardians their functions would cease at 21, and the other, founded on the maintenance and education clause. But, as the judgment is very shortly reported, it is important to observe that there were some signs in the will which might show that the maintenance and education were intended by the testator to be restricted to 21 or marriage. *Firstly*, the legacy was vested both by the actual words

[1] I have not succeeded in finding the record of the decree in this case, and in all probability it was not drawn up, so that the report in Ambler must be taken as accurate as far as it goes.

of the original gift, which only deferred payment, and by the gift of intermediate interest, as in *Vize* v. *Stoney* (1841), 1 D. & War. 337; and it would require very strong and clear words to divest property, especially where the legatee had been in receipt of the interest thereof. *Secondly*, in the case of George's portion, there was a direction that he was to be paid the principal 'if, and when, he should attain the age of 21 years,' when interest would no longer be payable to him under the maintenance and education clause, showing that here the testator clearly confined his meaning of the words to the age of 21 at most. It is a fair inference from this that he used the words in the same sense with reference to his daughters, according to the rule by which words are construed with the same meaning throughout a document, where such construction is reasonable. This would cause the daughter's interest for maintenance and education to cease at 21 or marriage, and would of course involve the payment of the principal at the same time. *Thirdly*, the gift-over itself is not clear, the £1,000 being directed to be paid to unmarried daughters only, who were to take 'as, and when, they should marry.' If the words requiring consent be read of marriage generally, the chances were increasingly in favour of no daughter being able to take under the gift-over, and it was a rational restriction to confine the divesting clause, as was done by the Lord Chancellor.

I submit, therefore, that it is reasonable to hold that the Lord Chancellor's remarks were not intended to be general, and were well founded on the particular will before him. It is to be remarked also that the will was inartistically drawn, and that the report is apparently but a short note of part of the judgment. And as to citing this case as an authority, why should 'one man's nonsense be interpreted by another man's nonsense?' (See also Lord Halsbury's protest in *Scalé* v. *Rawlins* '92, A. C. 342, and *In re Jodrell* (1890), 44 Ch. Div. at p. 605, and the judgments of Lindley L.J. in the latter case, and *In re Tredwell* '91, 2 Ch. 652.)

A few words as to Vice-Chancellor Wood's decision in *Gardner* v. *Barber* (1854), 18 Jurist 508, which is strongly relied on by Mr. Nuttall. It was held that the particular annuity for maintenance and education stopped when the grand-daughter attained 21: but there were two special reasons for this, (*a*) as noticed by Mr. Nuttall, two other annuities of the same amount were expressly given for life; (*b*) in the gift of the annuity a parenthesis was inserted, '(and so in proportion for any less term than a year),' which was not applied to the annuities, which were expressly given for life; and (*c*) the annuitant was a daughter of the testator's daughter Amelia, to whom one moiety of the residuary estate was

given for life, with remainder to her children at 21 or marriage, 'with full powers and authority for his said trustees *during the minority* of such' children, to apply the income for or towards their maintenance and education; from which it is evident that the testator confined 'maintenance and education' to the age of 21. So that we may fairly say that the Vice-Chancellor's decision was right on the will before him, and that his remarks on the general rule were obiter dicta, as were also those by Leach M.R. in *Badham* v. *Mee* (1830), 1 Rus. & M. 631.

There are two authorities not cited by Mr. Nuttall which are important cases against his main contention. The first is *Alexander* v. *M'Cullock* (1787), 1 Cox 391, before Thurlow L.-C., and is wholly opposed to the words attributed to Lord Campden. The will ran, 'I order that a fund may be lodged with J. Brown of Glasgow, so as to raise £48 per annum, for the support of J. H.'s children, to be paid them from time to time as their necessities require, without any regard to their father or mother.' The Lord Chancellor said he thought it probable the testator might mean this allowance to take place only during the minority of the children; but that upon the words he had made use of, it was impossible to restrain it to anything short of a life interest. The other case is *Kilvington* v. *Gray* (1839), 10 Sim. 293, where an annual allowance was left for the benefit of a boy until he should attain 16, 'I then leave him to the care of my trustees to provide for him in some business or profession, and his future maintenance, out of my funded property.' Maintenance was expressly given 'during their minorities' to three other infants, but out of life annuities. Shadwell V.-C. held that the boy was entitled to maintenance for life, saying, 'It seems to me that the word "future" comprehends all time'; though it is difficult to see how this word could make any difference, as a provision for maintenance must in each case contemplate futurity.

But the real point of the matter is that the words 'maintenance and education' are not technical words, and that they have no meaning in law, other than that in which the testator uses them, whose meaning, if not clearly expressed, must be taken to be that which would be intended by an ordinary man not trained to legal phraseology. Surely if this principle is sound, V.-C. Hall's words in *Wilkins* v. *Jodrell* (1879), 13 Ch. D. at p. 570, become very material, supported as they are by *Soames* v. *Martin*[1], *Frewen* v. *Hamilton*[2], &c. He says, 'There was a time when education came to an end much sooner than it does at present, and I think there was a Lord Chancellor in our own time who left Oxford before 21. But education at the present day, amongst persons in a certain

[1] (1839), 10 Sim. 287.

[2] (1877), 47 L. J. Ch. 391.

class and position in life, ordinarily lasts beyond 21; and I should say myself that a provision for education, according to the ordinary purpose and meaning of such a provision, is not limited to the age of 21; and if so, why should maintenance, which is another object of the gift, be limited to 21, being associated with education? Of course education ceases at a certain time, according to the particular purpose for which the person is to be educated, but maintenance is required, and lasts during his whole life; and giving a fair construction to such a provision, whether it be by way of trust or by way of gift, there is, in my opinion, nothing to limit it to minority.'

Again, supposing the question were considered apart from authority, how can the addition of the words 'for his maintenance' act so as to cut down an annuity that would otherwise last for life? And supposing the whole purpose of the gift failed by reason of the annuitant not requiring maintenance, how could the failure of the purpose affect the annuity?

W. A. Bewes.

JUDICIAL POWER IN THE UNITED STATES[1].

THIS is a learned and valuable book, of which the value is not to be measured by an Englishman's appreciation of the occasion which led to its being written. The Supreme Court of the United States upheld the power of Congress to make paper money legal tender on a ground which it expressed thus. 'Congress, *as the legislature of a sovereign nation*, being expressly empowered by the constitution to "lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin"—and being clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people in the form of coin, treasury notes and national bank bills—*and the power to make the notes of the Government a legal tender in payment of private debts being one of the powers belonging to sovereignty in other civilized nations, and not being expressly withheld from Congress by the constitution*—we are irresistibly impelled to the conclusion that the impressing upon the treasury notes of the United States the quality of being a legal tender in payment of private debts is *an appropriate means, conducive and plainly adapted to the execution of the undoubted powers of Congress, consistent with the letter and spirit of the constitution*, and therefore, within the meaning of the instrument, "necessary and proper for carrying into execution the powers vested by this constitution in the government of the United States"' (*Juillard* v. *Greenman*, 110 U. S. 449). The passages which we have printed in italics led Mr. Brinton Coxe to feel serious alarm for the security of the right of the Supreme Court to set aside any Act of Congress as being unconstitutional. What if Congress should pass an Act negativing that right? It could hardly be said that the power of requiring the Courts to apply the laws enacted by them is not one belonging to the legislatures of other sovereign nations, or that it

[1] An essay on Judicial Power and Unconstitutional Legislation, being a commentary on parts of the Constitution of the United States. By Brinton Coxe, of the Bar of Philadelphia. Philadelphia: Kay & Brother, 1893. One volume, large 8vo., xvi and 415 pp.

is not conducive and plainly adapted to the power of Congress to legislate. The only safety seemed to lie in the contention that the power to require the Supreme Court unconditionally to apply its enactments is expressly withheld from Congress by the constitution, that it is a power not consistent with the letter any more than with the spirit of the constitution.

But to find in the constitution the expression thus desiderated was perhaps difficult. That instrument says of itself that 'the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding,' but not that those judges or the Supreme Court shall be bound by it, anything in the laws enacted by Congress notwithstanding. And the powerful argument by which Chief Justice Marshall established the right of the Supreme Court to treat Acts of Congress as unconstitutional and void, in *Marbury* v. *Madison*, 1 Cranch 176, is rather of an inferential character than a simple reference to any text. It would seem easy to contend that the judges in *Juillard* v. *Greenman* laid too much stress on expression as opposed to reasonable construction. Or, since the instrument says that 'this constitution and the laws of the United States which shall be made in pursuance thereof . . . . shall be the supreme law of the land,' it might be thought on this side of the Atlantic that a mind which did not at once find in those words the expression desired would hardly find it anywhere. But although we cannot share the fear that the branch of the Supreme Court's authority which is in question has incurred any real danger, we are too well convinced of the importance of that branch to regret that to Mr. Coxe every letter of the constitution presented a claim for such scrupulous examination as might be due to a sacred scripture, and to all the support which he could give it by exposition and analogy. Indeed, the volume before us represents only a part of the labour which he deemed it necessary to bestow on the subject, and which his death prevented him from completing.

That labour was to have resulted in two parts, the second of which, never executed, was to be a textual commentary on the relevant passages in the constitution, establishing the express character of the power lodged in the Supreme Court to treat Acts of Congress as void for exceeding the constitutional authority of that body. We miss it with the less regret because Mr. Meigs, the editor of the volume, himself the author of a paper in the American Law Review for 1885, which enriched the subject with much historical research, has given, in the prefatory note, a sketch of what he gathers from the author's papers to have been his argument. What we have is the first part, completed and set up in type in

Mr. Coxe's lifetime, and being an historical commentary. In this Mr. Coxe has brought together with great industry whatever he could find, in any country or age, relating to the power of judges to set aside the Acts of a legislature, whether in vindication of a constitution, written or unwritten, or in obedience to any other principle of right held to be of higher authority than the will of the legislature. So far as the materials collected are of older date than 1787, they serve to show the intellectual surroundings of the framers of the American constitution, and so to throw light on their point of view and on the meanings with which they were likely to use particular words. So far as they are later than 1787, they are still relevant to the discussion by virtue of the reference made by the Supreme Court in *Juillard* v. *Greenman*, and above quoted, to 'the powers belonging to sovereignty in other civilized nations,' as helping to measure the powers belonging to Congress as incidental to those expressly given to it.

We thus pass successively in review France, Switzerland, Germany, the rules concerning rescripts and the *jus legum* in Roman law, the authority of the Canon law in England before the Reformation and elsewhere; all the claims that have been made to limit the power of the English Parliament, whether on behalf of the common law, the Royal prerogative, or the law of nations; the restrictions on legislation by the British colonies, the modes in which those restrictions have been enforced, and the precedents in the American States between the Declaration of Independence and the framing of the actual federal constitution. It appears that on the continent of Europe the Courts must give effect to the enactments of the legislature, even when they plainly exceed the limits set to its powers by a written constitution. Such an instrument is held to be addressed to the legislature and not to the judges. But it will greatly interest the English reader, and be less familiar to him, to find that in Rhode Island the power of the legislature was judicially held to be limited by constitutional principle at a time when no constitution had been adopted by the State since the Declaration of Independence, and when, therefore, the only restrictive writing which could be quoted was the clause against legislation repugnant to the laws of England which was contained, as usual, in the colonial charter. This was the case of *Trevett* v. *Weeden*, decided in 1786. The enactment in question was one which assumed to deprive offenders against a legal tender law of the right of trial by jury, and the argument against its binding force, to which the judges gave effect, assumed the continuity from colonial times of the terms on which the people of Rhode Island were associated together as a political body. Those terms, it was

said, included trial by jury as a constitutional right of the citizens, and the general assembly made laws and levied taxes by no other authority than that of the constitution, which consisted in those terms of association. The argument was a little aided by the fact that the enactment required the trial to be 'without any jury, by a majority of the judges present, according to the laws of the land.' and could therefore be represented as being inconsistent with itself. But probably no one who was unconvinced by the main contention would have hesitated to read the last words as meaning, 'in other respects according to the laws of the land.' We have, then, proof on both sides that the judicial power of controlling an enactment by a constitution does not depend, as in this country it is often supposed to depend, on the constitution being a written one. The power does not exist under the written constitutions of Europe, but it was held to exist under the unwritten constitution of an Anglo-American State. The difference, as Mr. Coxe remarks, appears to be more closely connected with the varying degrees of importance and respect enjoyed by the judges in different countries.

Before the relevant clauses of the constitution of the United States had received their actual shape, the judges of North Carolina, in the case of *Bayard* v. *Singleton*, had set aside an enactment of the State legislature interfering with the right of trial by jury in a civil suit, as being at variance both with the written constitution of the State and with the Articles of Confederation by which the United States were then mutually bound. However, a different result was reached in the case of *Rutgers* v. *Waddington*, in the State of New York, which then also had a written constitution, but in which party feeling raged with such intensity that the position of the Court was peculiarly difficult. It resorted to interpretation, possibly somewhat strained, in order to avoid a conflict between an enactment of the legislature on the one hand, and the law of nations and the treaty of peace with England on the other hand; and, following what Blackstone had laid down concerning the British Parliament, it said, 'The supremacy of the legislature need not be called into question; if they think fit positively to enact a law, there is no power which can control them.'

Besides thus tracing the environment in which the framers of the constitution of 1787 were placed by the legal precedents and literature of their own and other countries, Mr. Coxe has followed the history of the relevant clauses through the debates and resolutions of the convention, and added all the light which can be thrown on the intentions of the framers from their writings or from other sources. The investigation leaves no doubt on our mind that their intention was to give the Supreme Court the power of declaring

Acts of Congress unconstitutional and void which it has always exercised, nor can we doubt that they did so in words which no unbiassed reader of the constitution can fail to find sufficiently express. And we welcome the book as a valuable contribution to the literature of a legal and political question, of which the importance is not unlikely to increase in constitutional countries.

J. WESTLAKE.

MR. PIKE ON THE HOUSE OF LORDS[1].

MR. PIKE has made a valuable contribution to constitutional history in the book before us. It is valuable in several ways. It is learned, yet not lengthy. It is free from political controversy and constitutional optimism. It describes perhaps better, and at any rate more consecutively, than they have ever been described before, the history of the privileges and of the judicial powers of the House. It supplies much very useful material and some new light for the treatment of the growth of the peerage and of the legislative powers of the House.

But the attitude of isolation which the writer assumes is somewhat unfortunate. It is true that, in the preface, Hallam and Dr. Stubbs are mentioned as 'well-known historians' and Freeman as a polemical essayist; but the careful reader might search the text through without becoming aware that Freeman had ever lived, or that Hallam was more than a careless reproducer of secondhand information; while if he chose to follow up the references to the mistaken utterances of an 'eminent writer' or of 'recent historians' he would learn after some research that Dr. Stubbs had, according to his lights, made some contributions to constitutional history. The book loses value from this perverse determination to ignore the work of others. We cannot always be re-commencing the study of the constitution *ab ovo*. There is ample room for such a book as Mr. Pike has written, but the reader wants to know how he may connect the facts put before him with the general scope of constitutional history; how Mr. Pike addresses himself to the solution of problems which 'eminent writers' have admittedly left unsolved; what are his points of difference where he differs; with what qualifications he agrees when he does agree. There is an unpleasant suggestion of controversy as well as of incompleteness in a book which passes in silence by all the acknowledged modern authorities on the subject of which it treats.

The chapter on the *Curia Regis* suffers much from this mode of treatment. Here are many open questions. Was the Curia merely a name for personal government by the King? was it a definitely

[1] A Constitutional History of the House of Lords. From original sources. By Luke Owen Pike. London: Macmillan & Co. 1894. 8vo. xxxv and 405 pp. (12s. 6d.)

constituted court? was it a body of great officials forming, in effect, a standing committee of the Commune Concilium for purposes of justice and finance? We want an answer to these questions, and, instead, we have a learned and complicated account of the Courts and Councils of the Norman, Angevin, and Plantagenet kings, written as though the subject had never been approached before, and leaving the reader to find his own way through the maze and to draw his own conclusions.

As regards the creation of an hereditary peerage Mr. Pike has not only a store of interesting facts, but a very distinct theory. He holds that the summons to Parliament was a liability of tenure, that the writ of summons was meant to enforce the attendance of the baron, and that a summons followed by a sitting in Parliament did not establish a claim to an hereditary peerage until, with the introduction of new ranks in the peerage, rules of precedence came into existence and the dignity became an object of ambition. Thus obedience to a summons by writ was considered to give a right to the man so summoned and to his heirs lineal, and the contention was allowed. But Mr. Pike's attitude of opposition to current authority leads him to insist needlessly upon admitted facts, and to press the importance of tenure beyond reasonable limits. No one doubts that the majority, if not all, of the lords summoned to the early Parliaments held baronies of the Crown; or that there were intermissions in the summons of certain lords; or, sometimes, a failure to summon the heir of a man who had taken his seat as a baron. And, with deference to Mr. Pike, there is as little doubt that a baron who had received and obeyed a summons was, in practice, summoned to successive Parliaments and his heirs lineal after him. At what precise moment the practice became a rule and the rule created a right may not be easy to say, nor is it very material. But that the right when it came into existence rested on the writ of summons, and not upon tenure, seems practically certain. Some of the cases to which Mr. Pike refers do not sustain his theory. Thomas Furnival held of the Crown though not by barony; Warine de l'Isle held by barony though not of the Crown. Both were summoned, and the inference is that neither tenure of the Crown nor tenure by barony were essential conditions of summons.

The history of the Lords Spiritual is well told, and Mr. Pike brings out very clearly the mode in which the bishops lost their right of trial by peers owing to their claim to be exempt from all secular jurisdiction. We cannot, however, accept without reserve the assertion that the bishop's right to a summons rested on his temporal barony. Dr. Stubbs thinks that the bishop was sum-

moned in right of his spiritual functions, and points out that in the vacancy of the see, or the absence of the bishop, the guardian of the spiritualities was summoned in his stead. Mr. Pike contends that the guardian of the spiritualities, who clearly did not hold a barony, received a summons in order that he might communicate to the clergy the contents of the Praemunientes clause. One needs some evidence of this. It is strange that a man should be summoned who, on Mr. Pike's own showing, had no right to a seat, in order that he might transmit another summons to a body who, as Mr. Pike admits, habitually and notoriously declined to obey it.

In two other matters the controversial spirit seems to have led Mr. Pike astray. Archbishop Stratford, charged with disloyalty by Edward III, claimed to answer these charges before his peers in Parliament. He was desired to appear in the Exchequer: he did so, and made some answer to the charges, still claiming to appear in Parliament. After some bickerings the King met the Archbishop in Parliament and a reconciliation took place. But the statement that Stratford appeared in the Exchequer arouses Mr. Pike to unnecessary wrath. It originates with Birchington, a monk, who wrote in, or about, 1382, and has been accepted by Hallam and Dr. Stubbs. Mr. Pike says that it is inconceivable that Stratford, who was maintaining the rights of the spiritual peers, could have condescended to recognize the jurisdiction of the Exchequer; that he did about this time appear in the Exchequer, not in person but by his attorney, and not to answer charges of disloyalty but to meet a demand for his quota of a clerical subsidy; that the story arose out of 'a monkish ignorance of law, and the idle gossip of a monastery,' and that, in point of fact, the historians who have followed Birchington are much to blame.

Yet after all Birchington is probably right: he never says that Stratford submitted himself to the jurisdiction of the Exchequer sitting as a Court of Revenue, or a Court of Pleas, but that, on his second appearance, 'super articulis sibi objectis Regis consiliarios informavit.' Madox tells us that the King's Council sat not unfrequently in the Exchequer, and there sometimes dealt with important business which did not concern the revenue; and what really happened was that Stratford, who wanted to answer to the charges made against him in Parliament, was ordered to appear, and did appear, before the King's Council sitting in the Exchequer.

Again, Mr. Pike cannot bring himself to believe that, after the abolition of military tenures, James II should have called a Great Council of the Lords in 1688. It is strange that he should omit any notice of such a Council when he mentions the summons of the Lords by Charles I in 1640, and their spontaneous meeting at

the Guildhall after the flight of James. One cannot expect Mr. Pike to accept the statement of Macaulay, but Macaulay cites authorities which admit of verification. James himself, in a fragment of his memoirs preserved in Clarke's biography, says that he 'ordered the Lords Spiritual and Temporal to wait on him at Whitehall in the nature of a Great Council, as had been usually practised in such disorderly times.' His statement is confirmed by the contemporary testimony of Luttrell and Burnet, and it is hard to see why Mr. Pike should ignore a historical fact unless it be that the fact does not accord with his theory as to the position of the Lords as a feudal council.

To one point of modern controversy Mr. Pike has made a valuable contribution. The question whether the succession to a peerage is a right which the person entitled may waive, or a liability of which he cannot divest himself, has been discussed, in the case of Lord Coleridge, with more vehemence than logic or learning. Mr. Pike differs from Dr. Stubbs in upholding the theory of 'ennobled blood,' but it would seem that the two writers do not mean the same thing. Dr. Stubbs refers to the continental practice by which a dignity acquired by the ancestor conferred the privileges of nobility upon the entire family. Mr. Pike refers to the heritable character of a dignity which descends, not, as he truly points out, like an estate in fee to heirs general, but to heirs lineal, unless the descent is otherwise regulated by the patent. Granted that this heritable character attaches to a peerage, the liabilities must descend as well as the rights; and that the writ of summons *is* a liability, and was once regarded as an irksome liability, Mr. Pike establishes beyond question.

On this view of the law Lord Coleridge assumed the rights and liabilities of a peerage from the moment of his father's death, always supposing that he was the person entitled to succeed. While the House of Commons was still unprovided with the evidence on which it usually acts in such cases, Lord Coleridge incurred another disability by the acceptance of office, and the House, having evidence on this point ready to hand, declared the seat vacant. But if Lord Coleridge had not asked for his summons to the House of Lords, nor yet for the Stewardship of the Chiltern Hundreds, could he have retained his seat in the House of Commons? Towards the solution of this question Mr. Pike supplies more material in two pages (239–241) than can be found in the reports of the evidence taken by a Committee of the House of Commons last summer.

In conclusion, we part from Mr. Pike with gratitude for the learning and clearness which he has brought to bear upon an

intricate subject. If this review has been more critical than laudatory, this is partly due to the great and obvious merits of the book; partly to the fact that the historian of the House of Lords follows a path overgrown with technical and antiquarian research, or strewn with the wreckage of bygone controversies.

W. R. Anson.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Chapters on the Principles of International Law. By JOHN WESTLAKE. Cambridge: at the University Press. 1894. 8vo. xvi and 275 pp. (10s.)

THE third holder of the Whewell Professorship has long been widely known as one of the few authorities in this country upon the difficult topic which is best described as the 'Conflict of Laws,' but more usually, though very misleadingly, as 'Private International Law.' Mr. Westlake has, however, also long been known to experts in such matters as a high authority upon International Law, properly so called. More than twenty years ago he was one of the founders of the *Revue de Droit International.* He was one of the original members of the *Institut de Droit International*, and since 1888 has occupied the chair in which he was preceded by Sir W. Harcourt and Sir H. Maine. The volume before us doubtless contains the substance of lectures delivered from that chair. It is, as we are informed, 'not a detailed treatise upon International Law, but an attempt to stimulate and assist reflection on its principles.' It is, in fact, a series of essays upon the history of the science, and upon its leading topics, taken in their accustomed order. In such a series, the chapter on the Empire of India, valuable as it is, may perhaps be thought redundant, while, on the other hand, the work is obviously deficient in that it stops short of 'Neutrality.' Of this defect the author is fully conscious. 'Several more chapters,' he says, 'would have to be added in order to make this a complete work on the principles of International Law. My intention in planning it included one on the principles of neutrality'; and he gives us hopes of learning his views upon this subject at no distant date. In the meantime we are indebted to Professor Westlake for eleven admirable essays, dealing respectively with 'International Law in relation to law in general'; 'Theory bearing on International Law down to the Renaissance'; 'Ayala, Gentilis, and Grotius;' 'The Peace of Westphalia and Puffendorff'; 'Bynkershoek, Wolff and Vattel'; 'Principles of International Law'; 'The equality and independence of States'; 'International rights of Self-preservation'; 'Territorial Sovereignty'; 'The Empire of India'; and 'War.'

'Difficile est proprie communia dicere,' and the literature of International Law is already so enormous that there is a certain presumption against the necessity of each new treatise on the subject. But the volume before us amply justifies its existence. It is the work of an accomplished lawyer, who has long been a close observer of political events, and an independent thinker upon the problems which they suggest. One may be far from following the author in his criticism of Austin, or from sharing his views as to the relation of public to private International Law, but on these questions, as on many others which he has had occasion to discuss,

there is room for legitimate differences of opinion. The instructed reader, whether or no he always agrees with Mr. Westlake's reasonings, must always admire the easy mastery of the subject, the unostentatious learning, and the freshness of treatment, which are conspicuous in every page of the book. Many of Mr. Westlake's remarks at once arrest attention. It is, for instance, true, and has not been sufficiently noticed, that the men of the Renaissance failed to realize the inadequacy of such a scheme of International Law as they could deduce from the Law of Nature, and did not foresee the process of growth which is now, almost from year to year, so perceptible in the science. He appears, however, to overrate the extent to which the Law of Nations can be assimilated to municipal law. Although the former may be almost as well-defined and as certain in its operation as was English law in the time of Henry II, there is surely this difference between the two cases—that the English law of Henry II possessed the potentiality of being developed into the law of Victoria, while International Law can never attain to a similar development without ceasing to be itself and becoming the municipal law of a federal union of States. Bynkershoek gets an amount of notice, to which his strong personality well entitles him, but which he too often fails to obtain. There is a very interesting inquiry into the nature of those rights, such as to extradition and to the navigation of International rivers, which admittedly presuppose for their exercise conventions by which their precise limits are demarcated. It is certainly true, though often forgotten, that 'a personal union of States may grow into a real one by habit without any change of constitution,' and the statement is supported by the change which took place in the relations of England and Scotland between the reigns of James I and Queen Anne. The discussions on territorial sovereignty, on savage races, on Professor Lueder's views of the conduct of warfare, on the capture of private property at sea, are one and all deserving of careful study; as are the reasons which have obliged the author to come to the conclusion that 'pity, as an operative force in the mitigation of war, has nearly reached its limit.'

T. E. H.

[Opinions will probably differ for some time as to the value of the 'analytical' theory of law. To my mind Mr. Westlake's outspoken abjuration of it is not the least acceptable or important part of his work.—Ed.]

Principles of the Law of Personal Property. By the late Joshua Williams. Fourteenth Edition. By T. Cyprian Williams. London: Sweet & Maxwell, Lim. 1894. 8vo. lxxxviii and 620 pp. (21*s.*)

Legislation relating to the subjects dealt with in this popular work has been exceptionally active since the appearance of the last edition, and several judicial decisions (among which *Cochrane* v. *Moore* is probably the most important) have thrown new lights on important branches of the law of personal property. The mere bringing up to date would, therefore, in itself have necessitated a considerable amount of labour, but the learned editor has taken a stricter view of his duty, and, by the addition of new matter and a partial re-arrangement and re-construction of the former contents of the book, has greatly added to its value. Special attention has been given to the chapters relating to 'choses in possession' and to the history of the remedies for their recovery, in which the interesting researches of Mr. Justice Holmes and Professor Ames have been made available for the readers in a very compendious and lucid manner. But signs of the editor's careful

work are discernible throughout the volume, and as a result the whole subject is presented in greater completeness and in a more logical order than in the former editions.

It is possible that for this very reason occasional faults of arrangement and passages liable to be misunderstood are more noticeable, and we call attention to some of them, in the hope that in the next edition the scientific character of the work will be still more clearly accentuated than in the edition now before us.

On page 49 the cases in which ownership is severed from possession are enumerated as follows: (1) Taking or finding by an unauthorized person; (2) Bailment; (3) Lien; (4) Distress. This is misleading, because a right of lien can obviously arise in such cases only in which the possession and ownership had already become severed, and distress is an instance of involuntary loss of possession like the taking away or finding. Moreover, the case of an executed sale without immediate delivery of the goods ought to have been added.

The pledging and the mortgaging of goods should, in our opinion, be dealt with under one head. The latter subject is discussed with great elaboration on pp. 88–90, whilst the former receives rather step-motherly treatment in connexion with the subject of bailments (on p. 53).

The disabilities of infants, married women, lunatics, &c., in so far as they relate to conveyances, are mentioned on pp. 92–94, whilst their bearing on contracts is referred to on pp. 150–152. This involves a certain amount of repetition, and removes an opportunity for comparing the two sets of rules.

The provisions of the Act of 1830 (which, by the way, has ceased to be a 'modern' statute) relating to applications in respect of maintenance for infants, and the reference to the powers of management and administration under the Lunacy Act, 1890, seem rather out of place in a chapter dealing with 'Stocks, shares and annuities.'

The chapter dealing with 'Settlements' is somewhat encumbered by the mass of detail. Thus the statement on p. 362 that a person whose consent is required for an investment is 'not the sole judge of the propriety of any change of investment,' seems almost too obvious to be inserted into a text-book, and the observation on p. 377 that in the case of a voluntary settlement the solicitor ought to suggest the insertion of a power of revocation is somewhat misleading. There are many cases in which such a suggestion would be out of place, and, having regard to the provisions of the Finance Act, 1894, it might prove very expensive to the first tenant for life or to the other beneficiaries. E. S.

A Treatise on Possession of Land, with a chapter on the Real Property Limitation Acts, 1833 and 1874. By JOHN M. LIGHTWOOD. London: Stevens & Sons, Lim. 8vo. xvi and 342 pp. (15*s.*)

MR. LIGHTWOOD has done both a solid and an ingenious piece of work in this book. It will be found profitable by advanced students of the law, and the practitioner who has a difficult point arising out of possessory titles or interests will neglect Mr. Lightwood's guidance at his peril. The book is methodically arranged, and the matter is anything but diffuse; it would be unjust, therefore, to attempt a summary, and we shall mention only a few points we have specially noted.

The distinction between remedies founded on possession and remedies founded on title is well brought out. There is nothing essentially archaic

in this distinction, for it has been deliberately maintained in the modern legislation of British India. Sect. 9 of the Specific Relief Act (I of 1877) enacts as follows:—'If any person is dispossessed without his consent of immoveable property otherwise than in due course of law, he or any person claiming through him may, by suit instituted within six months from the date of the dispossession, recover possession thereof, notwithstanding any other title that may be set up in such suit. Nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof.' This essentially reproduces the relation of the assize of novel disseisin to the writ of right in medieval English law. We are not sure, however, that Mr. Lightwood does not unconsciously Romanize just a shade too much as to the 'petitory' character of the writ of right, though it would be hard to find any good exception to his actual statements of law. He misses or slurs (we are not sure which) the point that the phrase '*mere* right' not only represents a Latin *majus*—not *merum*—*jus*, but is identical with it, being only a corrupt version of its Old-French form.

The question of title and conflicting titles in ejectment is treated by Mr. Lightwood with much learning and subtilty. His endeavour to reconcile all the books by ascribing an operation hitherto (it would seem) undiscovered to the Real Property Limitation Act of 1833 is a feat *inter apices juris* which must command admiration even if it fails of assent. If we must choose, however, we prefer the bolder course of saying with Mr. Ames (Harv. Law Rev. iii. 325) that *Doe* v. *Barnard*, 13 Q. B. 945, was wrongly decided. We hold to the belief that *Asher* v. *Whitlock*, L. R. 1 Q. B. 1, is thoroughly sound according to both ancient and modern law, and is not to be cut down by refinements. On the other hand Mr. Ames, in the same place, appears to find the decision of the Judicial Committee in *Trustees' Agency Co.* v. *Short*, 13 App. Ca. 793, defensible on principle, which neither Mr. Lightwood nor Mr. Challis does. We are disposed to agree with Mr. Lightwood that even a tortious seisin in fee simple is not so easily got rid of as that case assumes.

The plea of *liberum tenementum* in ejectment has always been one of the puzzles of the law. Mr. Lightwood does not give what we believe to be the true solution. The plea did not on the face of it absolutely exclude a right to immediate possession on the plaintiff's part, and to that extent it was imperfect. But for that very reason it was allowed to be specially pleaded. It gave 'implied colour' to the plaintiff's claim, and so put the matter of title before the Court. Had it not 'given colour'—had it gone on, for example, to deny categorically that the plaintiff had any sort of title or claim to enter—it would have been bad as amounting to the general issue.

F. P.

A Commentary on the Sale of Goods Act, 1893, *with illustrative cases and frequent citations from the text of Mr. Benjamin's treatise.* By Walter C. A. Ker and A. B. Pearson-Gee. London: Sweet & Maxwell, Lim. 1894. 8vo. xliv and 380 pp. (18*s.*)

The work before us is a complete and exhaustive treatise on the whole law of the Sale of Goods. Sect. 61 (2) of the recent Act expressly reserves the rules of the Common Law, including the law merchant, save in so far as they are inconsistent with its express provisions. It becomes necessary therefore to consider not merely the text of the codifying statute, but the principles derived from the mass of case-law which has grown up around

this subject. The authors of the work under review were well equipped for their task by their previous labours in the same field of law. The wealth of principle contained in 'Benjamin on Sale' has been incorporated in a clear and condensed form in the present work, and combined with a careful and critical interpretation of the text of the Act. Great industry and skill have been shown in examining the statutory law on the Sale of Goods which has been re-enacted in the present Code, such as the so-called section 17 of the Statute of Frauds, sections 8 and 9 and other portions of the Factors Act, 1889, and various statutory regulations regarding the revesting of stolen property. A useful summary is given on pp. xliii and xliv of the effect of the new Act on the previous law by alteration or addition. The authors have not shrunk from expressing bold but carefully-considered opinions upon difficult and doubtful points; thus on p. 33 they criticize the difficulty of the distinction drawn by the C. A. between the recent case of *Taylor* v. *Smith*, '93, 2 Q. B. 65, and *Kibble* v. *Gough*, 38 L. T. N. S. 204, and *Page* v. *Morgan*, 15 Q. B. D. 228, as to what is a sufficient act of acceptance to constitute a recognition of a pre-existing contract of sale, apart altogether from the question of acceptance in performance of the contract. We have endeavoured in many ways to test the accuracy of the book, and have failed to find matter for adverse criticism. The law of the Sale of Goods is sometimes now prescribed as a special subject for examination by the Inns of Court, the Universities, and the Civil Service Commission. The present work would form an excellent text-book for fairly advanced students. Its chief value, however, will consist in its being a standard work of reference for the profession, containing, as it does, a full exposition of almost every point which is likely to arise in connexion with the subject-matter with which it deals. S. H. L.

A Students' Manual of English Constitutional History. By D. J. Medley. Oxford: B. H. Blackwell. 1894. 8vo. xxiii and 583 pp.

This book is what it professes to be, a compendium to be used by teachers and students; the author starts no theory of his own, and he is almost too careful to avoid the reproach of fine writing. He has given us, not a continuous narrative, but rather a history of institutions, in which the parts of our government are taken up one by one for historical description. Speaking generally, the book is accurate, trustworthy, and well adapted to the purpose which it is intended to serve. We note here and there some of the small errors which no author escapes in his first edition. The Lord President of the Council and the Lord Privy Seal are not 'necessarily' members of the House of Lords (p. 100). Lord Wensleydale was not 'childless,' though he had no son (p. 105). The potwaller surely boils his pot within his own walls, not 'in the streets' (p. 175). The Court of Chancery did not take 'appeals' from the Courts of Common Law (p. 340). The Church of England is not a Corporation (p. 510), but a society including many corporations. These are only such slips as any layman may make in writing on a legal subject; they do not seriously impair the value of the book. On p. 134 we may observe that Mr. Freeman's doctrine as to privilege of peerage is somewhat too strongly expressed. 'The peer was great and powerful because he was a member of a great and powerful assembly'—and also because he was a hereditary councillor of the Crown, who retained his privilege and might offer his advice even when Parliament was not sitting.

T. R.

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1. *The Finance Act*, 1894, so far as it relates to the Death Duties, and more especially the New Estate Duty. By JOHN EUSTACE HARMAN. London: Stevens & Sons, Lim. 1894. 8vo. xi and 194 pp. (5*s.*)

2. *A Guide to the New Death Duty*, chargeable under Part I of the Finance Act, 1894. By EVELYN FREETH. London: Stevens & Sons, Lim. 1894. 8vo. vi and 187 pp. (7*s.* 6*d.*)

THERE are two forms of ingenuity which will be brought into full play by the Finance Act, 1894. One is the ingenuity of interpretation—the judicial acumen which will have to say what the Act upon the Statute Book means. The other is the ingenuity of evasion—the art which will be invoked to escape the Act. We do not believe that testators will find many devices to help them out of the meshes of the wide net thrown by Sir William Harcourt. For the new Act is modelled upon the Succession Duty Act, which has stood the test of forty years' experience. If Mr. Harman had been able to devise a way out of the Act, his book would have its fortune made. As it is, it is a useful and carefully-written guide to one of the most difficult Acts which has ever received the Royal Assent. The Bill originally put forward was, we believe, one of five clauses only, and a marvel of ingenuity in the accursed way of legislation by reference. Read in this connexion a fraction of sect. 2 of the Act, sweeping in as property which is to be deemed to pass upon a death 'property which would be required on the death of the deceased to be included in an account under sect. 38 of the Customs and Inland Revenue Act, 1881, as amended by sect. 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property, and the words "voluntary" and "voluntarily" and a reference to a "volunteer" were omitted therefrom.' Well might Mr. Balfour remark that this is as if one were to read the Ten Commandments with the word 'not' omitted and all reference to a Supreme Being eliminated. It is a shameful way of legislating, and we do not believe it is necessary. While it is followed, the labours of many commentators will be needed. Mr. Harman's handbook will be found an unpretentious and a thoroughly serviceable companion. It contains all the rules and forms which have emanated from Somerset House, some of them perhaps being—low be it spoken—*ultra vires*. Mr. Freeth's book also is a convenient manual. But in our judgment it is a mistake of his to disregard the numerical order of the sections and to rearrange the new Act according to his own lights. Arbitrary as are the divisions of the Act, lawyers have to conform and to thread their troubled way through its mazes as best they can. With Mr. Freeth's thread in their hands they may be materially helped. But neither his index nor his text leads us to a fact which a denizen of Somerset House might surely have given if Mr. Harman could give it: Mr. Freeth might have told us, as Mr. Harman does, that in the forms of affidavit for probate it is not intended to insist on the statements which are ostensibly required as to property of which the deceased was trustee. This requirement was not in the Act itself, but was of Somerset House alone, and it was a needless and an impracticable requirement which ought never to have been made.

The Shipping Code, 1894. By ALEXANDER PULLING. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. La. 8vo. xxxviii and 414 pp. (*7s. 6d.*)

THE primary object of this work is to give a ready means of ascertaining the place and form in which each section of the repealed Merchant Shipping Acts is to be found in the consolidating statute, the Merchant Shipping Act, 1894. This object is carried out by an elaborate, but simple and effective, system of notes and tables. The work is not an ambitious but is a necessary and useful one. Statutes such as the Merchant Shipping Act, 1854, with its attendant series of amending, supplemental, and additional Acts, will long continue to be part of the necessary equipment of every mercantile lawyer's chambers, notwithstanding their repeal by the existing Act; and it is absolutely necessary to have a ready means of referring from the one to the other. Mr. Pulling's book is the first in the field, no time having been lost in producing it since the 25th of August last, the day of the passing of the Consolidating Act. For this reason, probably, the book does not contain much that will assist the practitioner in ascertaining the construction and effect of the Act, beyond what may be learnt within the four corners of the Act itself. A few cases are referred to, and there is a table of cases; but the table occupies no more than two pages, and many of the cases cited relate to the very special and intricate subject of compulsory pilotage. A work upon the Merchant Shipping Act similar to 'Shelford's Real Property Statutes,' or 'Morgan's Chancery Acts and Orders,' is what is wanted, and what we have never had; meanwhile Mr. Pulling's book holds the field. A second edition will perhaps supply what it would have been impossible in two months to have given in the first. The Introduction to the present volume contains what is not elsewhere to be found, namely, a statement of the legislation upon Shipping prior to 1854. This statement, which does not profess to be more than a sketch, covers eight pages only; but, so far as we are aware, no other eight pages give so good a general description of the legislation which occupies a very large part of the statute book. The existing Act alone runs to 748 sections; and it by no means exhausts the subject. Harbours, River Conservancies, Docks, Bill of Lading, Scotch Fishing Boats, Chain Cables, Admiralty Jurisdiction, Prize, and many other kindred subjects, find no place in the work before us for the reason that they are excluded from the Merchant Shipping Act.

One word as to the effect of so-called consolidating statutes. Mr. Pulling states in his Introduction that 'the authority of the decisions on the construction and application of the repealed Acts remains unimpaired, and they will have legal force in interpreting the sections which reproduce those on which they were originally pronounced.' This statement we think too wide. A decision of the Court of Appeal given almost on the day Mr. Pulling's book came to our hands, as to the effect of the County Courts Act, 1888, shows that consolidation Acts sometimes do more than their framers presumably intended them to do. We doubt whether there ever was a consolidating Act that left the law exactly where it was before.

We also have from the same author and publishers an annotated edition of the Act of 1894 (La. 8vo., viii and 414 pp., Comparative Table of Acts and index unpaged, 6*s.*), which is practically a cheaper issue of the same work, with a few omissions.

The Law of Waste. By WYNDHAM ANSTIS BEWES. London: Sweet & Maxwell, Lim. 1894. 8vo. xxxvii and 450 pp.

THERE are perhaps no questions occurring in practice that are more difficult to answer than questions on the law of waste. The difficulty arises in part from the fact 'that there is no book of modern times which deals at all exhaustively with the subject;' and the object of this book is to obviate this difficulty. While the author has not written a treatise on the antiquities of the law, he has wisely given a certain prominence to cases decided on the old statutory law of waste, with the intent that the practitioner who has occasion to refer to the older law may avoid the pitfalls incident to this very technical action and its forms of pleading.

The book commences with a discussion of the old statutory and common law remedies for waste: then follows discussion of the nature of waste, of waste in timber trees and underwood, of mines, minerals and fixtures, of the meaning of 'justifiable waste' 'without impeachment of waste,' and 'equitable waste.' The author then deals in an exhaustive manner with the questions arising where waste has occurred, viz. who is entitled to the proceeds of waste, and what are the rights of the parties where permissive waste has taken place. Then he deals with waste by particular persons, and the effect of conveyances; and, lastly, he discusses points of practice and the effect of delay.

The practitioner will find this book very useful, as all the cases are collected and discussed.

Principles of the Law of Interest. By SIDNEY PERLEY. Boston, U.S.A.: G. B. Reed. 1893. La. 8vo. xiii and 433 pp.

WITHIN the necessary limitations of his topic Mr. Perley has evidently expended much research and care, and his work will doubtless afford a considerable saving of labour to the practitioner. But, while there is much in this direction to commend, we cannot say that he is equally successful in the logical treatment of his subject. His book is indeed rather a digest than a treatise, and the 'principles' as developed by him are either too general or too fragmentary to make his presentation of the subject a final one, or in point of method fairly up to the mark.

As a digest it is also open to some criticism. Too frequently cases are brought together under one head which have merely a nominal connexion. Thus under the title 'Judgments,' mainly dealing with interest on judgments, are found divers cases of interest included in judgments, which properly relate to the commencement of the action and to the varying causes for which suit may be brought.

Headings or captions are used with commendable frequency; but the classification is too often trivial.

We must also except to the citation of cases by page and volume merely; especially where, as here, the abbreviations are considerable. The slightest inaccuracy in a figure may lose the citation entirely. Nor does the useful addition of the year fairly compensate for this defect. Horace's 'brevis esse laboro obscurus fio' is a wholesome warning.

There is a brief but interesting historical *résumé*, at the beginning of the work, of the scriptural and medieval view of interest—then called usury. There is, however, singularly, no reference to the most important text, on which was founded the prohibition by the Church, and, consequently, by the mercantile world, from taking any interest upon a mere money loan. We

refer to Luke vi. 35, where, as Dr. Döllinger has shown, the mistranslation in the Vulgate of the Greek ἀπελπίζοντες into 'nihil inde sperantes,' instead of 'nihil desperantes' (i.e. without fear of loss), changed the Saviour's injunction of willingness to lend into a prohibition to take any usura, or use (whence usury) from the loan. And this was logically worked out by the scholastic reasoning of Aquinas, whose doctrine, that money was incapable of usufruct, is echoed in the Shakespearian phrase, 'a breed of barren metal.'

An Election Manual for Parish Councillors, Urban and Rural District Councillors, and Guardians outside London. By WALTER C. RYDE. London: Reeves & Turner. 1894. 8vo. xl and 340 pp. (7*s.* 6*d.*)

THIS manual contains the text of the Orders of the Local Government Board which regulated the elections in 1894, together with the incorporated enactments relating to Corrupt and Illegal Practices, except the sections which deal with election petitions. There is a good introduction, and the Orders are abundantly annotated. The notes are for the most part clearly and carefully written, and the numerous references to cases decided on the interpretation of rules for other elections have been judiciously used.

In several instances the notes are not quite accurate. For instance, at page 10 it is erroneously stated that a person who holds any paid office under a Parish Council is disqualified for being elected a District Councillor, whilst it is not stated that a candidate is disqualified by being concerned in any contract or bargain with the Council. We have sought in vain for any statement that the register of electors is conclusive except in the case of prohibited persons; and at page 264 the author appears to confuse prohibition from voting with disqualification for being registered. The distinction is of practical importance, for whereas the register is conclusive as to disqualification, a prohibited person cannot vote although his name is on the register. It is doubtful whether the receipt of medical relief prevents a person at all from voting, but, if it does, it surely is by way of disqualification and not of prohibition (see *Stowe* v. *Jolliffe*, L. R. 9 C. P. 734). The author is, we think, wrong in including this among the grounds of prohibition.

Would it not have been well to state in the introduction or preface, or, better still, on the title-page, that the Orders on which the book is founded were applicable only to the elections held last December?

A Handy Guide to the Licensing Laws. By H. W. LATHOM. London: Stevens & Sons, Lim. 1894. 8vo. xxii and 149 pp. (5*s.*)

THIS book is intended as a pocket *vade mecum* for those having business connected with the licensing laws. The paragraphs are arranged dictionary-wise, under such headings as 'Music and Dancing'—'Name on Premises'—'Neglect to Apply'—'Notices,' &c. The author has very skilfully compressed a great deal into a small compass, and persons having to do with public-house property, otherwise than as legal advisers, would find this book not only useful, but sufficient; while even professional advocates will be able by its means to refurbish their arguments or find sheltering fence in easy rapid glances. The following paragraph indicates Mr. Lathom's style: 'It is no offence if customers call for liquors to carry away after closing hours if purchased before' (p. 51). This bald general statement, though correct, needs to be marked 'with care.' The leading case, *Brewer* v. *Shepherd*,

36 J. P. 373, refers, it will be remembered, to a man who bought his beer and then went to be 'shaved,' and fetched it after closing time. This case, by the bye, though quoted on another point, is not cited by the author in this connexion at all.

Referring to section 9 of the Act of 1874, which provides a penalty on a person who 'during the time at which premises for the sale of intoxicating liquors are directed to be closed sells or exposes for sale,' &c., Mr. Lathom at p. 51 has the following: 'This does not apply to the sale of intoxicating liquors by wholesale' (sect. 72 of the Act of 1872). This is also undoubtedly a true statement, but there is nothing to prevent any publican selling a wholesale quantity.

If the two propositions quoted hold good without any limitation—and no limitation is suggested by the author—a man might buy five gallons (wholesale) during close time, and, leaving it at the tavern, might fetch it away in pints during close time on Sunday afternoons.

The Brehon Laws: a Legal Handbook. By Laurence Ginnell. London: T. Fisher Unwin. 1894. 8vo. vii and 249 pp.

This volume appears to consist of lectures delivered before the Irish Literary Society in London. On that occasion, as the author tells us, he was congratulated by one friend on his choice of subject, and commiserated by another on the uninteresting nature of that subject. So the author respectfully dedicates his volume to those two friends; and on the whole we fear that he will disappoint both. In fact, he seems to have been himself haunted by the same notion, as we learn from what in any other book would have been the preface to its contents. Here, however, it forms the end of the last chapter, which he has been pleased to call his 'Conclusion'; and there he speaks as follows: 'If any one should open this little book with great expectations he will close it with disappointment correspondingly great. I have neither treated the whole subject descriptively, nor entered into an exhaustive criticism of any part of it. . . . My aim is to interest the general reader, to put within the reach of all who desire some knowledge of those laws a convenient synopsis of their leading features, with some corrections of current errors, and, above all, to induce some student better equipped than I to undertake a thorough examination of those laws, and treat the world to a work really worthy of the subject, and calculated to take the wind completely out of my small sail.'

Mr. Ginnell's modesty is calculated to mollify the heart of the severest critic, and let us hope that his book may interest the general reader; but we must candidly confess to some doubt as to the utility of a book on the Brehon Laws to interest the general reader, if there be such a strange entity. For anybody else we think it will still be better to read M. d'Arbois de Jubainville than Mr. Ginnell. In the first place we are not favourably impressed by the ready reception which he gives to certain uncritical opinions as to the early history of the Irish people: such a statement as the following is calculated to make anybody except the general reader pause: 'Many leading facts of Irish history have been quite satisfactorily ascertained to the extent of three hundred years before Caesar's time.' The same may be said of his words about the Brehon Laws, when he writes: 'Needless to say they were not written in a foreign tongue. No foreign mind conceived them. No foreign hand enforced them. They were made by those who, one would think, ought to make them: the Irish. They were made for the benefit of those for whose benefit they ought to have been made: the Irish.

Hence they were good; if not perfect in the abstract, yet good in the sense that they were obeyed and regarded as priceless treasures, not submitted to as an irksome yoke.' There were doubtless those who valued the Brehon Laws, but what do we know of the feelings of the masses with regard to them? Even according to Mr. Ginnell's own admission they formed the Feineachus written in the language of the Feini; but who were the Feini? In any case there is no reason to suppose that they were the only people of ancient Erin; and anybody who has given the matter a thought is forced to admit that it had at least two different peoples, the aborigines and their Celtic conquerors and rulers. It is useless, however, to dwell on matters of this kind, as the author seems to have read nothing written in recent years on questions of ethnology. And as regards the question of language, he is no better situated, though he feels duly 'grateful to the learned men who have surmounted the difficulties' of the text of the Brehon Laws. He can hardly be aware how much remains to be done in that direction, and when he ventures to touch on matters of philology himself the result is not encouraging. Although his grasp of the questions of race and language is feeble, there are a thousand and one other questions suggested by the Irish laws which he might have discussed; but one looks for that in vain. The most readable portions of the volume are beyond doubt the telling digressions in which he attacks English rule in Ireland from the time of Elizabeth down: he is at his best when he has somebody to assail.

Über die Leges Anglorum saeculo XIII ineunte Londoniis collectae. F. Liebermann. Halle: 1894.

Über Pseudo-Cnuts Constitutiones de Foresta. F. Liebermann. Halle: 1894.

Though the field in which Dr. Liebermann is labouring lies remote from the interests of English legal practitioners, he must not be allowed to suppose that they do not admire his work. Gradually by one pamphlet after another he is reconstructing a chronicle of what was until lately the darkest age in the history of our law, namely, the age which immediately followed the Norman Conquest. It will be well known to most of us that the age in question is represented to us by several treatises, or attempts to write treatises, which bear such titles as Leges Willelmi and Leges Henrici Primi. Before Dr. Liebermann turned to his task we used to see these things standing at the end of the Record Commissioners' edition of our Ancient Laws and Institutes, or at the end of Schmid's Gesetze, and perhaps we used to wonder whether any one would ever explain to us their origin and their nature. And now Dr. Liebermann is slowly unfolding an intricate story. He is showing us how so soon as order was established in England, men set to work upon the laws of the West-Saxon kings and the laws of Cnut, and tried to make them intelligible, and, as we should say, to bring them up to date, translating them into Latin but mod'fying them, sometimes honestly, sometimes dishonestly; for some of them were honest, if rather stupid, antiquarians; others were, according to their own lights, constructive jurists, bent on rationalising the traditional materials; while others again were no better than forgers, who were concocting ancient law in the interest of a class or of a theory. The tale is complicated by the literary communism or 'collectivism' of the age. Each man takes what he wants from the common store, tampers with it and makes it his own, and yet not his own, for as he has served his predecessors so he will be served in his turn.

The two last of Dr. Liebermann's pamphlets deal with two treatises in which interested forgery predominates, and the manner in which their true character is exposed is worthy the study of all those who can relish a fine piece of cross-examination. First, we have a large law-book which has worked up into itself a great deal of the existing legal materials, but has stuffed them with interpolations which glorify that colony of Troy town, the City of London, head of the realm and of the laws. Then we have a set of forest laws ascribed to Cnut, but really, so thinks Dr. Liebermann, manufactured in the last years of Henry II. With the sagacity of those marvellous trappers whom we used to know in our youth, the critic tracks his prey. Every blade of grass teaches him something. It is beautiful work and, so far as we can judge, it is sound work, such as could be done only by a man who knows the England of the twelfth century through and through, and whose ingenuity is the servant of his profound knowledge.

We have also received :—

Adulteration (Agricultural Fertilisers and Feeding Stuffs). By Francis H. Cripps-Day. London: Stevens & Sons, Lim. 1894. 8vo. xii and 140 pp. (5*s*.)—Specialization could hardly be carried farther than in the present volume, which deals with the law of adulteration only so far as affects agricultural fertilisers and feeding stuffs. The short Act (57 & 58 Vict. c. 56) relating to this question is set out in the text with copious notes. Where similar words in similar Acts have been judicially construed, as in the cases on the meaning of the words 'to the prejudice of the purchaser' and 'food' in the Food and Drugs Act of 1875, the decisions are cited and discussed. Great pains have been taken in collating the laws which are in force on the subject in America and in many parts of the Continent.

The work does not profess to deal in more than an elementary fashion with the agricultural, mercantile, scientific, and legal sides of its subject-matter, but it will be of much service in putting those who are concerned with the practical administration of the Act on the right track.

Fertilisers and Feeding Stuffs. By Bernard Dyer. With the text of the Fertilisers and Feeding Stuffs Act, 1893, and Notes by Alexander J. David. London: Crosby Lockwood & Son. 1894. 8vo. viii and 122 pp. (1*s*.)

Handbook of certain Acts affecting the Universities of Oxford and Cambridge and the Colleges therein. By W. B. Skene. London: Sweet & Maxwell, Lim. 1894. 8vo. 140 pp. (7*s*. 6*d*.)—Mr. Skene has collected in one volume the Universities and Colleges Estates Acts and other enactments relating to the same subject; the few cases illustrating this branch of the law are duly noted, and some useful forms are added in an Appendix. The work is intended as a supplement to Griffiths' 'Enactments in Parliament.' It should prove useful to Bursars of Colleges and their legal advisers.

Inebriety or Narcomania. By Norman Kerr, M.D. Third edition. London: H. K. Lewis. 1894. 8vo. xxxix and 780 pp. (21*s*.)—We noticed this work with approval in its earlier editions (L. Q. R. iv. 353; v. 435). The present edition is equally worthy of commendation. The work has been almost entirely rewritten. The new matter contains chapters on

etheromania in Ireland, inebriety and insurance, and the sequestering of habitual drunkards. We commend this treatise to all who are interested in the medical jurisprudence of inebriety.

The Lawyer's Companion and Diary for 1895. Edited by E. LAYMAN. London: Stevens & Sons, Lim., and Shaw & Sons. 1895. 8vo. 191 and 638 pp. (5*s.*)—This handy work contains, in addition to the usual 'Law List' information, tables of Costs, of the new Stamp Duties, the principal practical Statutes, and the Public Statutes of 1894. There is also a synopsis of statutory County, Local Government, and Parish business.

Sweet and Maxwell's *Diary for Lawyers* (edited by F. A. STRINGER and J. JOHNSTON. London: Sweet & Maxwell, Lim. 1895. 8vo. 396 pp. 3*s.* 6*d.*) contains much the same general information as *The Lawyer's Companion*—with the important exception that the *Diary for Lawyers* is not, like *The Lawyer's Companion*, also a Law List.

Nos. 6 and 7 of 'The Annotated Acts' (London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim.). *The Building Societies Act*, 1894, with Introduction and Index by W. F. CRAIES. 8vo. ix and 24 pp. (1*s.* net); *The London Building Act*, 1894, with Introduction, Notes, and Index by W. F. CRAIES. 8vo. ix, 121 and 28 pp. (3*s.*)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XVI. 1815–1817 (4 & 5 Dow; 2 Mer.; 1 Madd.; 3 & 4 M. & S.; 6 Taunt.; 1 & 2 Price; 4 Camp.). London: Sweet & Maxwell, Lim.; Boston (Mass.): Little, Brown & Co. 1894. La. 8vo. xvi and 843 pp. (25*s.*) Vol. XVII. 1816–1817 (3 Mer.; 2 Madd.; 5 M. & S.; 7 Taunt.; 2 Marsh.; 3 Price; Holt, N. P.) La. 8vo. xv and 714 pp.

The Law relating to Children . . . . including the complete text of 'The Prevention of Cruelty to Children Act, 1894,' with Notes and Forms. By W. CLARKE HALL. London: Stevens & Sons, Lim. 1894. 8vo. xvi and 184 pp. (4*s.*)

A Digest of the Criminal Law. By the late Sir JAMES FITZJAMES STEPHEN, Bart. Fifth Edition by Sir HERBERT STEPHEN, Bart., and H. L. STEPHEN. London: Macmillan & Co. 1894. 8vo. xlvii and 488 pp. (16*s.*)

The Law of Eminent Domain in the United States. By CARMAN F. RANDOLPH. Boston: Little, Brown & Co. 1894. La. 8vo. cxxv and 462 pp.—Review will follow.

The Merchant Shipping Act, 1894, with Notes, Appendices, and Index. By JAMES DUNDAS WHITE. London: Eyre & Spottiswoode. 1894. 8vo. xvi and 628 pp. (7*s.* 6*d.*)

The Statutes of Practical Utility . . . . arranged, with notes thereon, by J. M. LELY. Vol. 3, Part iv. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1895. 8vo. viii and 745–1658 pp. (20*s.*)

A Handbook of the Law of Defamation and Verbal Injury. By F. T. COOPER. Edinburgh: W. Green & Sons. 1894. 8vo. lxxvi and 319 pp. (14*s.* net.)

Commentaries on the Law of Persons and Personal Property. By THEODORE W. DWIGHT. Edited by EDWARD F. DWIGHT. Boston (Mass.): Little, Brown & Co. 1894. La. 8vo. lxii and 748 pp. ($6.00 net.)

Ruling Cases. Edited by R. CAMPBELL. With American Notes by IRVING BROWNE. Vol. II. Act—Ame. London: Stevens & Sons, Lim.;

Boston (Mass.): The Boston Book Co. 1894. La. 8vo. xxx and 791 pp. (25*s.*)

A Compendium of Sheriff Law. By P. E. Mather. London: Stevens & Sons, Lim. 1894. 8vo. xlviii and 578 pp. (25*s.*).—Review will follow.

The Study of Cases. A course of instruction in reading and stating reported cases, composing head-notes and briefs, &c. By Eugene Wambaugh. Second Edition. Boston: Little, Brown & Co. 1894. ($2. 50 net.)

A Treatise on the Law of Res Judicata. By Hukm Chand. London: W. Clowes & Sons, Lim.; Edinburgh: W. Green & Sons. 1894. La. 8vo. xx, 764, 38 and 23 pp.

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Natural Rights: a criticism of some political and ethical conceptions. By David G. Ritchie. London: Swan Sonnenschein & Co. 1895. 8vo. xvi and 304 pp. (10*s.* 6*d.*)

Des Contrats par correspondance. Par Jules Valery. Paris: Thorin et Fils. 1895. 8vo. xvi and 461 pp.

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The Editor cannot undertake the return or safe custody of MSS. sent to him without previous communication.
